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BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re METROPOLITAN COAL CONSUMERS' ASSOCIATION.

KARBERG'S CASE.

C. A.
1892
KEKEWICH. J.
Feb. 10.
C. A.
April 11; *May* 17, 30; *June* 3.

Company—Misrepresentation in Prospectus—Prospectus issued and Shares applied for before the formation of the Company—Laches—Return of Allotment Money—Interest.

B. signed a printed form issued by the promoters of an intended company, expressing his willingness to become a member of the council of administration of the intended company. *M.* also wrote to the promoters promising to help the company. Soon afterwards the promoters issued a prospectus in which the company was described as "to be incorporated under the *Companies Acts*," and an extract was given from the proposed articles of association to the effect that there would be a council of administration of members of the company, and a list of members of the council was appended containing the names of *B.* and *M.*

In reliance on this prospectus, *K.* applied for shares in the intended company. On the 31st of January, three days after *K.*'s application, the company was duly registered under the *Companies Acts*; and on the 2nd of February, the directors allotted *K.* the shares which he had applied for, and approved a form of prospectus substantially the same as that which had been issued by the promoters. On the 11th of February, *K.* paid the allotment money on those shares. On the 26th of June, *K.* discovered that *B.* and *M.* had both declined to take shares in the company and to become members of the council of administration, and took out a summons to have his name removed from the list of shareholders:—

Held (reversing the decision of *Kekewich*, J.), that the effect of the statement in the prospectus was not merely that *B.* and *M.* had expressed their willingness to become members of the council of administration,

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but that they had authorized the publication of their names as members, and as such was a false statement of fact; that the prospectus, although issued by the promoters before the formation of the company, was the basis of the contract between the company and *K.* for the allotment of shares; that the misstatement in the prospectus was relied on by *K.*, and was material to the contract, and consequently that *K.* was entitled to rescind the contract and repudiate the shares. And the Court, being of opinion that there had been no laches or acquiescence, ordered *K.'s* name to be removed from the list of shareholders, and the money paid by him on application and allotment to be returned with interest at 4 per cent.

Wainwright's Case (1) considered.

THIS was an appeal by Mr. *Peter Karberg* from an order of Mr. Justice *Kekewich*, refusing to remove his name from the list of contributories of the *Metropolitan Coal Consumers' Association, Limited.*

Early in the month of November, 1888, Captain *Montague Barber*, who was a promoter of the company, issued a circular proposing the formation of the company, and inviting persons to join in it. On the 14th of November, 1888, Lord *Brabourne*, who had received the circular, signed and sent to Captain *Barber* a printed form containing these words: "I am willing to become a member of the council of administration of the *Metropolitan Coal Consumers' Association, Limited*," and further assenting to the addition of his name to the list of "patrons" of the company. The paper stated that it was proposed that the company should be governed by a council of administration. Lord *Brabourne* accompanied this document with a letter to Captain *Barber*, in which he said that he had signed it because he agreed as to the desirability of starting such a society as was proposed.

It was alleged that Admiral *Mayne* signed a similar document; but the proof of his having done so was insufficient, in the opinion of the Court, to establish the fact. However, Admiral *Mayne*, on the 26th of November, 1888, wrote a further letter to Captain *Barber*, in which he said: "I fear I can be of little use on the council, as my time is fully occupied; but if it is desired, I have no objection to helping it in any way I can." Soon after this, without any further communication with Lord *Brabourne* or Admiral *Mayne*, a prospectus was issued by Captain *Barber* and

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 420.

the other promoters of the company which described the company as "to be incorporated under the *Companies Acts*," and gave a list of the "patrons." It gave also an extract from the proposed articles of association to the effect that "there shall be a council of administration of not exceeding twenty-five members of the association," and it then gave a list of the names of the council of administration, the names of Lord *Brabourne* and Admiral *Mayne* being included in the list. On the faith of this prospectus, as he alleged, and in reliance on the names of Lord *Brabourne* and Admiral *Mayne* appearing as members of the council, *Karberg*, on the 28th of January, 1889, signed and sent to Mr. *Jeffery*, the acting secretary *pro tem.* of the proposed association, two printed forms of application for 200 ordinary shares and 100 preference shares. The application for the ordinary shares was as follows: "Sir,—I desire to subscribe for 200 ordinary shares of £1 each in a company to be formed under the title of the *Metropolitan Coal Consumers' Association, Limited*, and I request you, on the formation thereof, to obtain the allotment of such shares to me." The application for the preference shares was in a similar form. Neither application contained any reference to the prospectus. On the 29th of January, *Karberg* paid £20 in respect of his application for ordinary shares, and £50 in respect of his application for preference shares. On the 31st of January, the company was duly registered under the *Companies Acts*. On the 2nd of February, the first meeting of the subscribers to the memorandum and articles of association, acting under the articles as directors, was held, at which an allotment of the shares for which *Karberg* had applied was made to him, and a printed copy of the original prospectus revised for final issue, but differing from the original only in slight and immaterial particulars, was approved and ordered to be issued. On the 11th of February, *Karberg* paid the further sum of £30 on his ordinary shares, and £200 on his preference shares.

Neither Lord *Brabourne* nor Admiral *Mayne* ever became members of the company. Admiral *Mayne* refused to take shares on the 21st of January, 1889; and Lord *Brabourne* also refused on the 16th of February. They both also declined to become members of the council.

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Karberg alleged that he did not discover the misrepresentations in the prospectus, on the faith of which he applied for and accepted the shares, until the 26th of June, 1889; and on the 3rd of July following he took out a summons to rectify the register by removing his name from the list of shareholders, and to have his contract to take shares rescinded. On the 13th of November, 1889, a petition was presented to wind up the company, and an order for winding-up was made on the 20th of January, 1890.

The hearing of *Karberg's* summons stood over pending the result of a similar application made by another shareholder named *Wainwright* under similar circumstances, except that the prospectus received by *Wainwright* was issued after the registration of the company.

On the 19th of December, 1889, Lord Justice *Kay* held that there had been such a misrepresentation as entitled *Wainwright* to have his name removed from the register; and his decision was affirmed by the Court of Appeal on the 9th of July, 1890 (1).

Karberg's summons came on for hearing before Mr. Justice *Kekewich* on the 10th of February, 1892.

Marten, Q.C., and *G. White*, for *Karberg*, contended that he was entitled to be relieved on the ground of misrepresentation in a prospectus which was ultimately adopted in all essential particulars by the company immediately after its incorporation; and that he was not precluded by laches from obtaining relief.

They cited *In re London and Staffordshire Fire Insurance Company* (2); *Redgrave* v. *Hurd* (3); and *Stewart's Case* (4).

Warmington, Q.C., and *H. Terrell*, for the liquidator, were not called upon.

KEKEWICH, J.:—

The Applicant, *Peter Karberg*, seeks to rescind his contract with the company on the ground of misrepresentations which

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429.
(2) 24 Ch. D. 149, 154.
(3) 20 Ch. D. 1.
(4) Law Rep. 1 Ch. 574.

induced him to enter into that contract, and—whether he says so in terms or not—he is bound to add, misrepresentations made by the company, including, of course, in that phrase misrepresentations made by the authorized agents of the company.

I accept the law as laid down by Mr. Justice *Pearson* in the case to which Mr. *White* called my attention of *In re London and Staffordshire Fire Insurance Company* (1). He says (2): "In my opinion, when those who have made a misrepresentation wish to resist a claim of this kind, the *onus* is upon them to shew that notice of the misrepresentation was given to and received by the person whose claim they are resisting." But that statement of the law assumes necessarily that the misrepresentation was made by those who are resisting the claim. It seems to me that it is the first duty of the Applicant, not only to prove the misrepresentation, but to trace it to the company, or other party to the contract, as against whom they are seeking relief. I think the Applicant here has entirely failed to do that; indeed, the facts are such that I do not think any possible evidence could prove his case. His application for shares was made on the 28th of January, 1889, before the company existed; and therefore, strictly, it could not have been made to the company; but apparently it came to the hands of the company, and the company accepted his application and allotted the shares, so that he could not afterwards say that there was not a contract apart from this representation between him and the company. His case is that he made the application for shares on the faith of a prospectus which reached him before the 28th, and, therefore, before the registration of the company. How can that be a misrepresentation by the company? And if it cannot be a misrepresentation by the company because the company had no existence, equally it could not be a misrepresentation by an agent of the company, because the company, having had no existence, could have had no agent.

That the prospectus contains misrepresentations will not avail the Applicant in that point of view as against the company. It may or may not give a right of action against some other parties; but I repeat, that in a claim for the misrepresentation of a

(1) 24 Ch. D. 149. (2) 24 Ch. D. 154.

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contract, he is bound to bring the misrepresentation on which he relies home to the other party to the contract against whom he seeks rescission.

The only attempted answer is this. The company did, as a matter of fact, accept his application for shares and allotted shares to him; they did so at a meeting at which a prospectus was approved, and that prospectus, though not identically the same with that which was received by Mr. *Karberg*, was substantially the same slightly altered. The argument is that, having accepted his application for shares, and having entered into the contract on the faith of that application, the company are bound also to accept the prospectus, and also to accept the liability of the misrepresentation. The answer to that may be put in many ways. The first, and, to my mind, conclusive answer, is this. How can the knowledge of the prospectus which Mr. *Karberg* received, or the responsibility for that prospectus, be brought home to a company which had then no existence at all, there being nothing like inchoate existence as regards a company? The company had no existence at all at the time that prospectus was issued. That is a complete answer. But, to my mind, the answer may be put in another way. The company received from Mr. *Karberg* an application for shares independently of any prospectus; it is not shewn that they even knew that he made the application on the faith of the prospectus, nor even that he had received any prospectus at all from any one; and, there being nothing to connect the application with the prospectus, they cannot be held to have adopted the prospectus sent to him, with whatever liability there was attaching thereto, merely because they adopted his application for shares, which was unconnected, as between him and them, with the prospectus. That being so, it appears to me that the case scarcely admits of serious argument; but it certainly breaks down whichever way you put it. I think it, therefore, unnecessary to go into the further question whether, assuming him to have had a case as against the company, he has lost that case by laches.

The application must be refused with costs.

G. I. F. C.

Karberg appealed from that decision.

The appeal came on to be heard on the 11th of April, 1892.

By consent of the parties, the evidence in *Wainwright's Case* (1), was treated by the Court as evidence in the present appeal.

Marten, Q.C., and *G. White*, for the Appellant *Karberg*:—

In this case, the application for shares was made by *Karberg* upon the faith of a statement in the prospectus of a company about to be formed and two days before its incorporation, and the case is governed by the decision in *Wainwright's Case*. The statement upon which the Applicant relied was, that Lord *Brabourne* and Admiral *Mayne* were members of the council. It turned out that neither of them would have anything to do with the company, and, upon the principle of *Anderson's Case* (2), *Karberg* is entitled to have his name removed from the register of shareholders.

Warmington, Q.C., and *H. Terrell*, for the liquidator:—

This is the case of a contract to become a member of a company which a person was induced to enter into by means of misrepresentations made by a third party; but that is no ground entitling him to be removed from the register as against the company.

In the second place, this was not a statement made as to a company already in existence, but merely as to one about to be formed. The application was, moreover, to an individual, asking him to endeavour to obtain shares in the unformed company for the Applicant.

[KAY, L.J.:—The application surely continues in force up to the allotment.]

This is merely an authority to a person who says, "I shall probably be in a position to put your application forward." No agreement with the company could have been entered into in any legal sense, because there was no company in existence to contract with. This case, therefore, differs materially from *Wainwright's Case*. There was nothing actually untrue in the prospectus at the time when it was issued; it shewed on the

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429. (2) 17 Ch. D. 373.

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face of it that the company had not yet been formed, and that those who were mentioned as members of the council had promised and were expected to be such. At that time Lord *Brabourne* and Admiral *Mayne* did intend to join the company and become members of the council; and when the shares were allotted to *Karberg* the directors who allotted them had no reason to suppose that those gentlemen would not join the company. There is no evidence that the statement that Lord *Brabourne* and Admiral *Mayne* were to be members of the council was the inducement for *Karberg's* application for shares. In order to succeed in an application such as this, it is necessary that this fact should be distinctly proved. We also rely on the delay and acquiescence of the Applicant. Numerous circulars which stated the true facts of the case were sent to him; but he took no notice of them, and did not take any steps to have his name removed till July, 1889.

Marten, in reply.

1892. May 30. LINDLEY, L.J.:—

This is an application by Mr. *Karberg* to be struck off the list of contributories of the *Metropolitan Coal Consumers' Association*, and to recover the money he paid for his shares on their allotment to him. His ground is that he was induced to take shares in the company by a misrepresentation in the company's prospectus. He says it was the same as that which in *Wainwright's Case* (1) this Court decided to be a misrepresentation entitling *Wainwright* to have his name removed from this list. *Wainwright*, however, applied for his shares after the company was registered, and on the faith of a prospectus issued by the company after its formation. *Karberg*, on the other hand, applied for his shares before the company was formed, and on the faith of a prospectus issued by its promoters. In *Wainwright's Case* the prospectus in effect stated that Lord *Brabourne* and Admiral *Mayne* were members of the council of association, which was not true, and the company knew before they allotted shares to *Wainwright* that Lord *Brabourne* had refused to be on the council. In

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429.

Karberg's Case the prospectus stated in effect that Lord *Brabourne* and Admiral *Mayne* would be members of the council, which is a very different matter. Moreover, the company accepted *Karberg's* application for shares before the company knew that either Lord *Brabourne* or Admiral *Mayne* had refused to be on the council. The two cases, therefore, are dissimilar in many material respects. Mr. Justice *Kekewich* did not investigate the question whether the statement in the prospectus was true or not, but held that even if untrue the statement could not be treated as made by the company. This short mode of disposing of the case did not appear to us satisfactory.

Under these circumstances, it became necessary for us to investigate the facts, and it was arranged that the evidence given by Lord *Brabourne* and by Admiral *Mayne* in *Wainwright's Case* (1) should be treated as evidence in this case also; and that all books and documents which were before the Court in that case should be treated as in evidence in this.

I pass now to the consideration of the facts of this particular case. On the 31st of January, 1889, the company in question was formed. [His Lordship then referred to the memorandum and articles of association, and continued:—] The company appears to have been got up by a Captain *Barber*, and some time early in November, 1888, he issued a circular of some sort; but no copy of it can now be found, and its general nature can only be inferred from documents of a later date. On the 14th of November, 1888, Lord *Brabourne*, who appears to have received the circular referred to, signed and sent to Captain *Barber* a very important paper, in which he expressed his willingness to become a member of the council of administration of the *Metropolitan Coal Consumers' Association*, and also to be a patron of the same company. Whether Admiral *Mayne* signed a similar document does not clearly appear; but on the 26th of November, 1888, he wrote and sent to Captain *Barber* a letter which contained the following sentence:—"I fear I can be of little use to the council, as my time is fully occupied; but if it is desired, I have no objection to helping it in any way I can."

Some time in November, 1888, but when exactly does not

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429.

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appear, a prospectus was issued without any further communication either with Lord *Brabourne* or with Admiral *Mayne*. [His Lordship read the prospectus, the effect of which has been stated above, and proceeded:—] On the faith of this prospectus, and in reliance on the names of Lord *Brabourne* and Admiral *Mayne*, Mr. *Karberg*, on the 28th of January, 1889, *i.e.*, three days before the company was registered, signed and sent to Mr. *Jeffery*, the secretary of the association—that is, of the promoters—two printed forms of application for shares, viz., one for 100 preference shares, and one for 200 ordinary shares. These forms had been issued by the promoters, but the forms do not in terms refer to the prospectus. [His Lordship read the application, and continued:—] Cheques for £70, the amount payable on application, were sent by Mr. *Karberg* at the same time. On the 2nd of February, 1889, these applications were laid by Mr. *Jeffery* before the board of directors, and the shares applied for were allotted to Mr. *Karberg*; and on the 11th he paid the money payable on allotment, viz., £230.

In the interval, viz., on the 7th of February, the company itself issued a prospectus approved by the board on the 2nd of February, and containing the names of Lord *Brabourne* and Admiral *Mayne* as members of the council of administration. This was done on the faith of the letters signed by them in November. On the 14th of February Lord *Brabourne* applied for shares; but on the 16th he withdrew his application, and refused to have anything to do with the company. Admiral *Mayne* had refused to take any shares in the company, or to do anything beyond ordering coal from it, at an earlier date, viz., on the 21st of January, 1889, in a letter written to Captain *Barber*; but I cannot find any proof that the directors knew this when they allotted shares to *Karberg*.

On the 3rd of July, 1889, after *Wainwright's* proceedings had shewn what the truth was about the prospectus, *Karberg* applied by summons to have his name removed from the register of members, and to have the money paid by him in respect of them returned. The company had not then been ordered to be wound up, and Mr. *Karberg's* right to repudiate his shares is unaffected by the fact that the company is now in liquidation.

His right to repudiate his shares depends primarily on the answers to be given to the following questions:—

1. Was the statement in the prospectus, on which Mr. *Karberg* relies, a statement of fact or an expression of an expectation only?

2. Was the statement of fact, if any, untrue, or was the expected state of things not really expected by those who issued the prospectus?

3. Was the prospectus the basis of the contract formed by the application and allotment of shares?

4. Was the statement contained in it material to the contract?

5. Did Mr. *Karberg* rely on it?

6. Assuming all these questions to be answered in his favour, is he precluded from obtaining relief by acquiescence, laches, or delay?

The first difficulty in the case turns on the meaning of the prospectus—on the meaning which a person reading it might fairly put upon it. Bearing in mind that the prospectus in question was published, not, as in *Wainwright's Case* (1), by the company after its formation, but by the promoters of the company before its formation, the meaning may be simply that when the prospectus in question was published there was reason to expect, and it was *bonâ fide* expected and believed by those who issued it, that Lord *Brabourne* and Admiral *Mayne* would be on the council of administration when the company should be formed. If this was the meaning, the statement was true; for the letters these gentlemen signed might be fairly understood so as to qualify this expectation and belief. They might feel annoyed at having their names published, but the statement would nevertheless have been true. I have no doubt that if a man says he expects so and so when he does not, his statement is an untrue statement of fact; but if he really does expect what he says he expects, there is no untruth whatever in what he says.

But the prospectus may mean, and I think does mean, more than I have suggested. It may mean, and does, I think, mean, that Lord *Brabourne* and Admiral *Mayne* had not only expressed their willingness to become members of the council of

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429.

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administration, but had so far approved of the project as to have authorized the publication of their names in the list of those who would be members of the council of administration of the company when formed, although they might possibly change their minds or retire early. I have come to the conclusion that this is the real meaning, because no other would have answered the purpose of those who issued the prospectus. A statement that Lord *A.* and Admiral *X.* were expected to join the company would not answer any useful purpose. The promoters must have intended the public to understand a great deal more than this; and I am satisfied that the prospectus was intended to be understood as meaning, and ought to be treated as meaning, what I have stated. If this was the meaning, the statement was not true.

I have carefully read the whole of the evidence in *Wainwright's Case* (1); and in this case I have come to the conclusion that, notwithstanding the letters which Lord *Brabourne* and Admiral *Mayne* were imprudent enough to sign in November, 1888, yet that they never had in fact agreed to become members of the council of administration of this company, and never authorized any statement in any prospectus that they had. The compromising papers signed by these gentlemen were signed before any prospectus was issued—before any memorandum or articles of association existed—before the qualifications, if any, of a member of the council were settled or even discussed. The papers thus signed can only in fairness be regarded as part of a negotiation which never in fact ripened into or became an agreement with the promoter of the company or any one else. The evidence satisfies me that the names of Lord *Brabourne* and Admiral *Mayne* were inserted in the prospectus without their knowledge and authority, and that, although they had expressed a willingness to join the council, still many matters had to be settled before it could be fairly said that they had agreed to do so, and before any statement that they had agreed to become members of the council ought to have been published.

I pass now to the next point, viz., whether Mr. *Karberg's* application for shares can be treated as based on the prospectus, on the faith of which it was really made. The learned Judge

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429.

thought it could not; but in this I cannot agree with him. I can find no case exactly in point. Speaking generally, there is no doubt that a misrepresentation in order to vitiate a contract must be made by a party to it, or by his agent. But this rule is not without exception. *Stewart's Case* (1) and *Downes* v. *Ship* (2) warrant the proposition that an application to a company when formed for shares, based upon a prospectus issued by the promoters of the company before its formation, cannot be dissevered by the company from such prospectus. The offer to take shares is an offer to take them on the terms of the prospectus, and on no other terms; and the acceptance of the application by the allotment of the shares is the acceptance of the offer on those terms, and not on other terms. Applying this principle to the present case, it follows that the misrepresentation proved to have been made in the prospectus, although not made by the company or by its agents, vitiated the only contract into which *Karberg* and the company entered, and entitled *Karberg* to repudiate it, provided it was material to the contract and the repudiation was made in time.

The company, not having made the representation by itself or by its agents, is not liable in damages; but as regards rescission of contract, the company is in the same position as if it had made the representation itself without knowing it to be untrue. But in an action for rescission of contract on the ground of misrepresentation, it is not necessary to prove knowledge by the Defendant of its untruth: see *Redgrave* v. *Hurd* (3).

With respect to the materiality of the misrepresentation little need be said. Few matters are more material than the names of the first directors or managers, or, in this case, the members of the council of administration. What is a prospectus worth without the names of good men upon it? Mr. *Karberg's* affidavit proves that he relied on the names of Lord *Brabourne* and Admiral *Mayne*.

It remains only to consider the question of laches. Although Mr. *Karberg* certainly might have been more vigilant, yet, considering his affidavit and his cross-examination and

(1) Law Rep. 1 Ch. 574. (2) Law Rep. 3 H. L. 343.
(3) 20 Ch. D. 12.

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re-examination, I think it was reasonable that he should wait and see what became of *Wainwright's Case* (1), and that there is not sufficient laches or delay to bar him from relief. Acquiescence there was clearly none; for whatever he might have known about the facts, he did not really know them until shortly before he issued his summons. On this point, however, I shall be willing to hear further argument.

I ought not to pass over the fact that Admiral *Mayne* had refused to take shares in the company on the 21st of January. If Mr. *Jeffery* knew this, he ought not to have laid *Karberg's* application for shares before the directors; but the directors knew nothing of Admiral *Mayne's* letter, and when they allotted the shares to *Karberg* they did not know that either Lord *Brabourne* or Admiral *Mayne* would not join the council. On this part of the case the facts do not bring it within the principle of *Anderson's Case* (2), although *Wainwright's Case* was covered by that decision.

I regard this case as one of considerable difficulty and of some novelty. I am alive to the danger of taking too favourable a view of attempts to escape from bad bargains in the desire to defeat fraud. I have, however, slowly come to the conclusion that, subject to further argument on the point which I have mentioned, Mr. *Karberg* has made out his case, and that he is entitled to the relief which he seeks.

The appeal must be allowed with costs here and below in the usual way.

BOWEN, L.J.:—

I am of the same opinion.

KAY, L.J.:—

The Applicant *Karberg* seeks to have the register of this company rectified by removing his name from the list of shareholders and to have the amount paid on his shares repaid with interest. The summons for this purpose was taken out on the 3rd of July, 1889, or about six months before the winding-up of

(1) 62 L. T. (N.S.) 30; 63 L. T. (N.S.) 420. (2) 17 Ch. D. 373.

the company commenced. The ground of the application is that the prospectus on the faith of which the shares were taken contained material misstatements. It stated that Lord *Brabourne* and Admiral *Mayne* were on the council of administration. The prospectus was issued before the actual registration of the company, and this appears on the face of it. The statement, therefore, could not mean more than that these gentlemen and the others named had consented to become members of the council of the company when formed. The statement is prefaced by an extract from the articles of the intended company which shewed that the council must consist of members of the association.

Neither Lord *Brabourne* nor Admiral *Mayne* ever became a member of the company. On the 21st of January, 1889, Admiral *Mayne* refused to take shares. On the 16th of February Lord *Brabourne* refused also. On the 19th of February Lord *Brabourne* refused to join the council; and on the 12th of March Admiral *Mayne* did the same. On the 14th of November, 1888, Lord *Brabourne* had signed a consent to be on the council of a proposed association, accompanying such signature with a letter to the promoter, Captain *Barber*, in which he stated he had so signed because he agreed as to the desirability of starting some such society as was then proposed. Admiral *Mayne* seems to have signed a consent to be on the council on the 26th of November, 1888; but this is not clearly proved. *Karberg* applied on the 28th of January, 1889, for 100 preference and 200 ordinary shares. The company was registered on the 31st of January. The shares were allotted to him on the 2nd of February. I am satisfied from the evidence that all that Lord *Brabourne* and Admiral *Mayne* consented to was to be on the council of a company to be thereafter formed with their approval. They never consented to be upon the council of any company which the promoters might choose to form without their knowledge or approval. This company was in fact so formed. They never consented to be on the council of this particular company. The publication of their names as having so consented was entirely unauthorized. It was untrue originally, because their consent was only conditional, and when the company was formed under a memorandum and articles of which they knew nothing,

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the company accepting an application for shares or allotting them to a person who applied on the faith of that prospectus were liable always to have the contract so made rescinded, as having been induced by a material allegation which was not true, even if there was no fraud in the matter.

That it was material I have no doubt. Persons taking shares in these companies are very much influenced by the names they see in the prospectus. That it was untrue is proved by the evidence. That evidence is supported by all the probabilities of the case. That Lord *Brabourne* or Admiral *Mayne* should have consented to be on the council of any company thereafter formed, whatever personal obligations that might involve, is so improbable, that the evidence that their consent was conditional on their approving the terms on which that company was to be formed cannot for a moment be doubted. The company afterwards formed might by its articles have imposed onerous conditions on the members of the council, which neither of these gentlemen would have been willing to accept. They had not bound themselves, nor indeed could they bind themselves, before the company was formed to be members of the council. But the statement is that they had consented to be members of the council of this particular company. It seems to me that this was altogether unwarranted. When the company was actually registered the statement could only be justified if the two gentlemen named had approved that particular company and consented to be members of its council, and the company could not properly allot shares on an application, made on the faith of the prospectus previously issued, without treating the statement in it as amounting to a representation that there had been such an approval and consent.

At the conclusion of the judgments, their Lordships intimated that they wished to hear further argument on the question of laches and acquiescence before their decision was finally pronounced.

1892. June 3. The case was again argued this day on the question of laches and acquiescence.

H. Terrell, for the liquidator.

Marten, Q.C., and *G. White*, for the Appellant, were not called on.

LINDLEY, L.J., said that there was no satisfactory evidence of any laches or acquiescence on the part of the Appellant. The judgment of the Court must, therefore, stand as delivered.

BOWEN and KAY, L.JJ., concurred.

H. Terrell, submitted that no interest ought to be given on the sum to be repaid, no fraud having been proved against the directors which could support an action of deceit.

THE COURT held, that where a contract was rescinded, interest on money actually paid under it ought to be allowed, not by way of damages, but on the ground that the parties were to be restored as far as possible to their original position. The Appellant must have interest at 4 per cent. on the money which he had paid from the time when he paid it.

Solicitors: *Rowley & Co.*; *Lumley & Lumley*.

M. W.

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June 16.

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[1891 M. 828.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13 [*Revised Ed. Statutes, vol. xvii., pp.* 528, 534]—"*Sewer.*"

M. built ten houses, laid down a large pipe drain at the back of them, and made a drain into it from each house. The large drain ran into a cesspool on *M.'s* land, near the houses, and was then carried on for a few yards through *M.'s* land till it reached the foreshore of a tidal river, and then, after passing for a short distance through the foreshore, discharged into the river. No licence to drain through the foreshore had been obtained, and it was not proved that *M.'s* scheme of drainage had been approved by the Local Board. After some time the lessee of the foreshore built upon it, and stopped the mouth of the drain, which it was admitted he was entitled to do. The overflow from the cesspool being thus stopped, the cesspool caused a serious nuisance. *M.* brought his action against the local board to restrain them from permitting the nuisance to continue, alleging that the structure was a "sewer," and the cesspool a "thing belonging thereto," within the meaning of the *Public Health Act*, 1875, and was therefore vested in the local board, and that they were bound to keep it in order:—

Held, by the Court of Appeal (Lord *Coleridge*, L.C.J., and *Lindley*, and *Lopes*, L.JJ.), that this was not a sewer within the meaning of the Act, for that the continuation through the foreshore, which *M.* had no right to make, must be left out of account, and then there was nothing left but a set of pipes terminating in a pit on *M.'s* own ground, and, as they did not carry the sewage away, they could not be considered a sewer.

Decision of *Chitty*, J., affirmed.

IN 1883 the Plaintiff *Meader* built five pairs of semi-detached cottages fronting to a new road called *Pelham Road*, at *West Cowes*, in which road there was at the time no sewer. *Meader* made drains from the several cottages into a larger pipe drain which ran behind the cottages into a cesspit, about five feet in diameter and six feet deep, made on *Meader's* own ground, close behind the back yards of the cottages. The pipe drain was carried on for about fifteen yards from the cesspit through *Meader's* ground, till it reached the foreshore of the tidal river *Medina*. It was carried on for a few yards through the foreshore and discharged into the river. No licence was obtained to carry the drain through the foreshore, or to discharge sewage upon it. It was not proved that *Meader's* scheme of draining his cottages had

been approved by the local board. The cesspit was emptied by *Meader* when it required cleaning out.

In January, 1890, a Mr. *Atkey*, who had obtained a lease of the foreshore from the Board of Trade, complained of a nuisance from the overflow, and *Meader* wrote to him: "I am sorry if the overflow from the cesspit of my houses in *Pelham Road* is causing any nuisance to you. If you will kindly bear with it a short time, I think the local authority is about to provide a sewer, when I should at once do away with the pit and overflow. I will do my best to remove the nuisance, if at any time called upon by you to do so." Shortly afterwards, *Atkey* proceeded to reclaim the foreshore, and blocked up the outlet of the above drain. The consequence was that the cesspit was filled to overflowing, and created a serious nuisance. It was admitted that *Atkey* had not gone beyond his rights.

The local board made a sewer in *Pelham Road*, but the basement of *Meader's* houses was too low to be drained into it. The nuisance continued, and, before the end of 1890, the local board gave *Meader* a notice to empty and cleanse the cesspit, with which he complied.

In March, 1891, the local board gave *Meader* another notice, requiring him to abate the nuisance by emptying and cleansing the cesspit. *Meader*, and two of his tenants in the same month, commenced an action against the board for an injunction restraining the Defendants from causing, or permitting to be caused, a nuisance to the Plaintiff's premises in *Pelham Road*, and for damages.

The case made by the Plaintiff was, that this was a sewer within the meaning of the *Public Health Act*, 1875, and, as such, was vested in the local board, and that they were bound to cleanse it.

The action was heard before Mr. Justice *Chitty* on the 24th of February, 1892.

Levett, Q.C., and *G. Henderson*, for the Plaintiff, contended that the pipes which drained the ten cottages constituted a sewer within the *Public Health Act*, 1875, and that the cesspit was part of the sewer, and being a sewer it was vested in the

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local board under the 13th section of the Act, and that that authority was bound to keep the sewer so as not to be a nuisance.

Whitehorne, Q.C., and *W. Graham*, for the Defendants:—

The local board contended that the cesspit was not part of the sewer, even assuming that the drain pipes constituted a sewer within the Act, and did not vest in the local authority.

[The following cases were referred to: *Sutton* v. *Mayor of Norwich* (1); *Croft* v. *Rickmansworth Highway Board* (2); *Acton Local Board* v. *Batten* (3).]

CHITTY, J.:—

Some eight years ago or so the Plaintiff built five pairs of houses with drains from the backs of the houses leading into a set of earthenware pipes, the diameter of which was six inches. In the course of that which I will dignify, according to the language of the Act of Parliament, with the name of a sewer, namely, the set of pipes, they crossed a pit 4 ft. 6 in. in diameter, and 6 ft. 8 in. in depth, and the depth of the bottom of the pit below the bottom of the pipes is some 4 ft. 6 in. or 8 in. After the pipes had reached the pit they were continued on by the Plaintiff, who constructed the work entirely on his own land until he came to the land of a Mr. *Atkey*, and there, without any title, he carried on his pipes until the sewage, brought down along the course of them, emptied itself into a place called the *Deep Water Sink*, which was at the mouth of the river *Medina* where the tide flowed. Latterly, Mr. *Atkey*, acting entirely within his rights, has stopped up the pipes, so that the sewage no longer flows into the river, and the effect is to cause the sewage to back, and the result is, as admitted both by the Plaintiff and the Defendants, a nuisance. The Plaintiff asks for an injunction against the Defendants in respect of this nuisance.

Now the case is a remarkable one. The Plaintiff's counsel argued at the Bar that this series of pipes which I have described, is a sewer within the *Public Health Act*, 1875, and it seems that it does fall within the definition of a sewer given

(1) 27 L. J. (Ch.) 730. (2) 39 Ch. D. 272.
(3) 28 Ch. D. 283.

there. But then the argument first presented was, that one pit which I have partly described is part of the sewer, and then by a well-constructed logical argument, it is said that the whole of the work is vested in the Defendants, the local board under the 13th section of the Act, and the next step is that under the 19th section of the Act, the local authority is bound to cause the sewers which belong to them to be kept so as not to be a nuisance. By this course of reasoning the conclusion is arrived at, that the nuisance is occasioned by the Defendants by reason of their breach of duty in not properly using, cleansing, and so forth, the sewer which is theirs.

In my opinion this pit is a cesspool. It does not form part of a sewer within the definition clause of the Act of Parliament.

It was not and is not a sufficient cesspool according to the evidence given on both sides. Cesspools, as is well known now, are considered to be injurious to health, and things to be got rid of. But it was contended that this particular pit could not have answered all the purposes which would have been required of a cesspool according to the notions of the Plaintiff when he constructed his houses, and when he constructed his so-called sewer. But though it is a small cesspool, in my opinion it is not the less a cesspool.

Now cesspools plainly are not vested in the local board, and there are various sections in the Act of Parliament which confer on the sanitary authority the right, according to the provisions of the Act, to cause cesspools to be kept so as not to be a nuisance. I refer to the 40th section which runs, so far as I need read it, as follows: "Every local authority shall provide that all drains," and so forth, "and cesspools within their district be constructed and kept so as not to be a nuisance or injurious to health." Then there is the 91st section which also deals with cesspools, and some subsequent sections which I need not stop to explain.

Now the local board have complained to the Plaintiff with regard to his cesspool, and required him to cleanse it. That he has not done, and he by way of retort upon the local board has brought this action against them for the purpose I have mentioned. I agree with the argument of the Plaintiff's counsel

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on this point, that the cesspool was not constructed in the best way of construction for a cesspool; the bricks were not cemented, nor was the cesspool faced with cement, and by leaving the joints of the bricks open, unquestionably a certain amount of the sewage running down would pass through and percolate into the soil as far as the soil would admit it, and the soil appears to be river mud. Evidence has been given as to the number of times within a week, or almost within a day, that it is necessary to cleanse the cesspool in order to prevent those who dwell in the houses being affected by a nuisance. It may be that this cesspool requires to be cleansed once a day, or twice a day; but I am of opinion that the nuisance, as I have said, is caused by the cesspool, and consequently it is not caused by any act or default of the Defendants. And if the Plaintiff who constructed the sewer had to do his duty by the cesspool in cleansing it as many times as it ought to be cleansed, according to the plan of construction, and if he omit that duty, he has no cause of complaint whatever against the local board.

There was an attempt made in argument, and slightly in the evidence, to induce the Court to say that this is not a cesspool, but an inspection pit. That notion has been completely displaced by the evidence given. It evidently was intended to be compared to a manhole, where a man goes down into a sewer for the purpose of inspecting the sewer; but in this case if a man goes into the pit he goes up to his middle or up to his shoulders, as one of the witnesses said, into the filthy sewage which is there. That was an entirely erroneous view of the fact. Then as to the point that this so-called manhole is part of the sewer, I am not deciding any general question about what is or what is not part of the sewer in the abstract, I am deciding what is and what is not part of this so-called sewer, and I say unquestionably that this cesspool is not part of the sewer.

Then one other ingenious argument on the part of the Plaintiff's counsel requires to be noticed; and it was that the other part of the sewer, that is, so much of the sewer as lies between its commencement and the pit itself, is in a foul state, and therefore there is a nuisance in this respect, caused by the sewer which is vested in the local board. The answer again to that is

plain. If there is a nuisance in that part by reason of the backing of the sewage, that arises because the Plaintiff does not do his duty in cleansing, as he ought to cleanse, the cesspit itself.

I think this is a very bold attempt on the part of the Plaintiff to turn the tables against the local board, who really have a complaint against him whereas he has none against them.

I dismiss the action with costs.

G. M.

C. A.

The Plaintiff appealed. The appeal was heard on the 16th of June, 1892.

Levett, Q.C., and *G. Henderson*, for the appeal:—

The Plaintiff's case is that this cesspool which causes the nuisance is part of a sewer which the local board are bound to keep clean. By the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), s. 4, a "drain" is defined to be a drain used for the drainage of one building only or premises within one curtilage, and made only for the purpose of communicating with a cesspool or sewer. By the same section "sewer" in the Act includes all sewers and drains to which the previous definition of "drain" does not apply. Here we have a sewer draining ten houses, so it is a "sewer" within the Act. By sect. 13, "all existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto, except sewers made by any person for his own profit, or by any company for the profit of the shareholders" (with certain other exceptions which it is unnecessary to notice), "shall vest in and be under the control of such local authority." If this cesspool is not part of the sewer, it is at all events a work belonging to it, and therefore is vested in the local board. Sect. 15 enacts that every local authority shall keep in repair all sewers belonging to them. We do not complain of want of repair. Sect. 19 provides that "every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." There is a set of exclusions bearing on cesspools. Sect. 40 orders every local authority to provide that

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all "drains water-closets earth-closets privies ashpits and cesspools," within their district, be constructed and kept so as not to be a nuisance. By sect. 41 where any person complains that any "drain water-closet earth-closet privy ashpit or cesspool on or belonging to any premises" is a nuisance, the board may after notice to "the occupier of the premises" empower their inspector to enter, and if a nuisance is found may require the owner or occupier of the premises to do what is necessary to abate the nuisance. Sect. 47 imposes penalties on everyone who allows the contents of any water-closet, privy, or cesspool to overflow or soak therefrom. Sect. 91 provides that "any pool ditch gutter watercourse privy urinal cesspool drain or ashpit so foul or in such a state as to be a nuisance or injurious to health," shall be deemed a nuisance liable to be dealt with summarily under the Act, and by sect. 96 power is given to order the owner or occupier of property to abate a nuisance upon it. It is clear that in all these sections the cesspool intended is a cesspool belonging to a house, not a cesspool forming part of a sewer vested in the board. It is settled by authority that the mere fact that a sewer was made by a person on his own ground for his own purposes does not prevent its being a "sewer" vesting in the board.

[*Whitehorne*, Q.C., for the Defendants:—We do not dispute that.]

The contention of the Defendants comes to this, that if there is a cesspool in the course of a sewer, the ownership is broken; and that though the upper and lower parts of the sewer are vested in them, the cesspool which comes between the two parts is not. *Pinnock* v. *Waterworth* (1) closely resembles the present case. The cesspool there was the terminus, and was held part of the sewer—*à fortiori*, a cesspool is a part of a sewer which goes beyond it. The report only deals with the question whether the sewer was made by a person for his own profit, so as to come within the exceptions in sect. 13; but the other point was fully considered, as appears from a shorthand note of the judgment of Mr. Justice *Cave*, which we produce.

(1) 51 Justice of the Peace, 248.

[LINDLEY, L.J.:—Sect. 19 only provides that the board shall cleanse the sewers, not mentioning works connected therewith.]

It is enough for us that sect. 13 vests them in the board; if they are vested in the board it must be the duty of the board to keep them in proper condition. It was urged below that mandamus was our only remedy; but an action will lie: *Meek* v. *Whitechapel Board of Works* (1). This was manifestly a sewer while it went on to the sea; and it cannot cease to be a sewer by its end being stopped up. An extensive construction is to be given to the word "sewer": *Acton Local Board* v. *Batten* (2).

[LINDLEY, L.J.:—Can a pipe which leads nowhere be a sewer?: *Croft* v. *Rickmansworth Local Board* (3).]

That case was under an Act containing no definitions clause. In *Bonella* v. *Twickenham Local Board of Health* (4), it was held that the board were bound to keep in order a sewer which had vested in them, and not having taken steps within a reasonable time after its vesting against the persons primarily benefited by it, could not afterwards come against them for the expenses which were made necessary by its becoming insufficient. Here the original drainage scheme was approved by the local board.

[*Whitehorne*, Q.C.:—That is not admitted nor proved.]

It was not disputed below; and, therefore, evidence was not tendered; but the Plaintiff is in Court, and if the Court thinks fit he can give evidence on the subject. It is not likely that he would render himself liable to a penalty under sect. 25 by not asking the approval of the board.

[LINDLEY, L.J.:—It is not likely that the board would approve of a system of drainage which depended on the will of the owner of the foreshore.]

Whitehorne, Q.C., and *W. Graham*, for the local board, were not called upon.

LORD COLERIDGE, C.J.:—

In this case an attempt has been made, in the words of Mr.

(1) 2 F. & F. 144.
(2) 28 Ch. D. 283.
(3) 39 Ch. D. 272.
(4) 18 Q. B. D. 577; 20 Q. B. D. 63.

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Justice *Chitty*, to turn the tables against the local board, and make them answerable for a series of wrongs committed by the Plaintiff, which really gave the local board a claim against him.

If the Act of Parliament clearly shewed that this is a sewer within the words of the Act, of course we must give way. But although the mischievous results that would follow from acceding to an argument are not necessarily decisive against the sufficiency of the argument, yet, nevertheless, where a particular interpretation of a statute lands us in consequences so very serious as those which would follow from that contended for here by the Plaintiff, we cannot but lean to the view that that is not the true construction. An Act of Parliament might enact something the consequences of which would be very unjust and very unreasonable; but we should not, if we could avoid it, come to the conclusion that Parliament had so enacted.

In this case the argument of the Appellant is that here there is a sewer which drained ten houses, and that though after some time it terminated in a cesspool, it was originally prolonged beyond the cesspool to the foreshore of the river *Medina*, and there discharged itself; that it was, therefore, a sewer which carried sewage to a place where it was discharged into the river —that it, therefore, by virtue of the words of the Act of Parliament, was "a sewer" as defined by the 4th section of the *Public Health Act*, 1875—that it did not come within the excepted cases of the 13th section, and, therefore, under that section it vested in the local board; and, that if it so vested, then by the 15th and 19th sections, they were bound to keep it in repair, and prevent it from becoming a nuisance. That is the argument presented on the part of the Plaintiff.

On the part of the Defendants the argument comes to this: that, really looked at sensibly in a common business point of view, this never was a sewer at all, or if it was a sewer, it was not a sewer within the words of the Act of Parliament, and was never vested in the local board, and that they cannot be called upon to do what they have been called upon to do by this proceeding.

In determining that question it seems to me that we must entirely reject from the consideration of the case so much of the sewer (if we may so call it) as was carried through land which

did not belong to the Plaintiff, and which he had no licence from the owner to use, so that the carrying the pipes through it was an act of trespass so clear that Mr. *Levett*, who certainly took every conceivable point in favour of his client, did not and could not deny that Mr. *Atkey*, in stopping the outlet, was acting clearly within his right. In my judgment so much of the sewer (so to call it) as was put without any sanction or licence on the land of another person, and which that other person had a right at any moment to stop, cannot be part of a sewer within the meaning of the Act of Parliament, and cannot have been intended by the Legislature to vest in the local board. If so, it follows that you must treat this sewer, or whatever you are pleased to call it, as ending in the cesspit, for this is a cesspit, and it is not the less so because it does not happen to be a very large one. If so, this so-called sewer is a series of pipe-drains, which end in a cesspit on the Plaintiff's own land, and they do not go any further.

Now, it appears to me that you cannot say that the cesspit is a sewer, nor when the history of it is known can you say that it is a work or thing which is so connected with the drain or sewer, whichever you please to call it, as to bring it within the general words of sect. 13—"works and things belonging thereto." It is the cesspit which creates the nuisance, and if it was not for the cesspit there would be no nuisance. It is the collection of the fæcal matter in the cesspit which produces the mischief. If I am right in saying that this is a cesspit, and is not so connected with the tile drains which run into it as to belong thereto, it never vested in the local board, and the cleaning out of it is not a matter for which the local board are in any manner liable. The case of *Reg.* v. *Guardians of Epsom Union* (1), though not directly in point, is important as regards the limits of the liabilities of a local board in respect of a work such as this cesspit. That was an action of mandamus, there was a return to the mandamus, and the goodness of the return was tried as is not often the case at *nisi prius*. The jury found in favour of the defendants, the *Epsom* guardians. They were called on to repair and they returned in substance, that the sewer was so insufficien

(1) 11 W. R. 593; 8 L. T. (N.S.) 383.

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and badly constructed that they could not mend it, and that if it were made complete it would create a nuisance. It was urged that if it could not be repaired the defendants must reconstruct it. The Court said, "No, that is not what they are bound to do. They are bound to repair, and if what they are asked to do does not come within a liberal interpretation of the expression 'repair,' but requires a new set of works, that is a perfectly good return to the mandamus." The jury having found in favour of the defendants, the case was taken to the Court above for the purpose of getting a new trial, and the Court, consisting of Sir *Alexander Cockburn*, Mr. Justice *Blackburn*, Mr. Justice *Crompton*, and Mr. Justice *Mellor* (a very strong Court), held that the return was perfectly good, and that the guardians were not bound, under such circumstances, to repair the sewer. That is not directly in point here, I agree; but it is an important case as shewing what are the limits of the liability of a local board, and what are the principles by which the Court will be guided in considering what the duties and liabilities imposed on them are, and it has a strong bearing on the present case because here we see plainly that unless some entirely fresh and new construction is made the mere dealing with this pit as it stands would not to any reasonable or adequate extent remove the nuisance. There is, however, this further and, as it seems to me, conclusive mode of dealing with this case. This series of pipes—I use on purpose those words—never vested in the local board unless it was a sewer within the meaning of the Act. It was not the series of pipes which created the nuisance, but the cesspool; and the Plaintiff's case rests on the footing that the cesspool is a "thing belonging" to a sewer. I agree with the remark made by Lord Justice *Lopes* during the argument, that a sewer means in the Act of Parliament something that carries sewage away, and a set of pipes which begins somewhere, but which really—I do not mean literally, but practically—ends nowhere, and which does not carry the fæcal matter away is not a sewer. The set of pipes with which we are dealing, striking off, as I have said, the portion on the foreshore of the *Medina*, which Mr. *Atkey* shut up, is not a sewer, it is a series of pipes, which does not act as a sewer. It is said that it is a drain, which does not come within the definition of a "drain"

in the Act, and therefore that by the terms of the Act is a sewer; but it is a drain which does not drain, and therefore does not satisfy the Act. I should come to this conclusion apart from the evidence. When, however, we come to the evidence of the Plaintiff himself, and his admissions in cross-examination, if I were acting as a jury I should not hesitate to say that neither the local board nor the Plaintiff ever dreamt that this set of pipes was vested in the local board. It is undoubted that at least once, if not oftener, the attention of the Plaintiff was called to the state of his sewer by the local board and that the local board called on him to clean it out, and that he obeyed the notice and did that which he now says it was the duty of the local board to do. Moreover, we find that when Mr. *Atkey*, the lessee of the foreshore, complained to the Plaintiff of a nuisance, the Plaintiff wrote to him saying that he would do his best to remove the nuisance. If his present contention is correct, his simple answer would have been, Do not write to me; this sewer is vested in the local board, and you ought to go to them and not to me to remedy the evil complained of. He, therefore, not only acts on the notices which, if his present case is correct, were notices which the local board had no right to give; but he writes to a third person admitting the liability which he seeks now to throw on to the local board. On the other hand, the local board clearly thought that it was the Plaintiff's duty and not theirs to keep the cesspool clear, as is shewn by their notices to him with which he more than once complied. If, therefore, there was any doubt, which I do not think there is, about the true construction of the Act of Parliament, it seems to me that the evidence in this case is very strong to shew that neither party ever dreamt that this was a sewer within the meaning of the Act of Parliament, or that the liability was what the Plaintiff now alleges it to be. Of course, if the Act of Parliament is clear, the acts and opinions of individuals cannot make any difference in its construction, but where the question is what sort of thing this is, and the liability depends on the true view of what the thing is, then the fact of both parties acting on the view that this was not a sewer vesting in the board, is strong evidence to shew what is the true character of

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the subject-matter; and if the true character of the subject-matter be what I have said, then the local board is right, and Mr. Justice *Chitty* was right in his view, and this appeal ought to be dismissed with costs.

LINDLEY, L.J.:—

I agree. This is a very ingenious attempt by a man who has created a nuisance by draining ten houses into one hole to throw upon the local board the obligation to clean it out. If there had been ten holes instead of one it is clear that the local board would have nothing to do with them; but by the way in which the work has been constructed there is only one hole instead of ten. That one hole had an overflow, and that overflow went into another man's land, and that man has stopped it, and now we are asked to say that this was a sewer vested in the local board. We are asked to decide whether that overflow vested in the local board, and whether the cesspool was vested in the local board? If it was, why did the Plaintiff always clean it out? If we turn to the Act of Parliament, this cesspool is not a drain, and it is not a sewer within the definition of that expression. It might be a work or thing belonging to a sewer within sect. 13; but the evidence, to my mind, coupled with the examination of the Plaintiff, shews that although it might be, it is not, and, if so, there is an end of the Plaintiff's case.

LOPES, L.J.:—

I cannot think that anything which does not drain can properly be called a drain, or that anything which does not carry away sewage can properly be called a sewer. Does this cesspit perform the operation of carrying away the sewage or anything else? It appears to me that it does not, and for this reason. So much of the alleged sewer as lies between the cesspit and the *Medina* must be thrown out of the case. What was done between those two points was an unjustifiable trespass on the part of the Plaintiff, and I think that to shew what the effect of it is it is sufficient to ask this question—Can it be said that a right *in alieno solo* can be conferred on a local authority by the wrongful act of a third party? Now, cutting off that part of the alleged sewer, what

remains? All that remains is the cesspit and the pipes which lead from these ten cottages to it. It all terminates in this cesspit.

In my opinion the Plaintiff never had a notion that this alleged sewer was a sewer at all, of or vested in the local board, until he was called on by the local authority to remove the nuisance. Up to that time I think it is clearly established that he had no such idea, because we find him from time to time cleansing this cesspit and submitting to the requirement of the local board that he should do so.

In the result, I come to the conclusion that this cesspit is not a sewer, nor any work belonging to a sewer, and I think, therefore, that the judgment of Mr. Justice *Chitty* is right, and that this appeal should be dismissed.

Solicitors: *Ley, Lake, & Ley*, agents for *Richard Roach Pittis, Newport, Isle of Wight*; *Damant & Toovey*, agents for *Damant & Sons, Cowes, Isle of Wight.*

H. C. J.

In re LAXON & CO.

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June 22.

Winding-up—Company—Transfer of Proceedings from County Court to High Court—Transfer before Winding-up Order—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 3.

A company was registered as a limited company; but two of the subscribers of the memorandum of association were infants. A petition by creditors was presented for winding it up as an unregistered company; or in the alternative, as a limited company. The capital being under £10,000, the petition was presented in the County Court; but before it came on for hearing *Vaughan Williams*, J., made an order for transferring it to the High Court:—

Held, on appeal, that the power given by the *Companies (Winding-up) Act*, 1890, to transfer "the winding-up of a company, or any proceedings therein," extended to a petition on which no order had been made; that the Judge, therefore, had jurisdiction to order a transfer; and that, having regard to the importance of having a valid winding-up order, and to the nature of the question as to the *status* of the company, good cause was shewn for making the order.

ON the 25th of February, 1892, *W. H. Hart* and *F. W. Hart*, as creditors, presented in the County Court of *Warwickshire* a

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petition to wind up this company as a limited company, on the ground of its insolvency.

The company had been registered as a limited company on the 22nd of June, 1891, with a nominal capital of £5000 in £5 shares. Its object was to carry on the businesses of grocer, tea-dealer, and provision merchant, and its registered office was at *Coventry*. After the petition had been presented the Petitioner discovered that two of the eight persons who had signed the memorandum of association were still infants.

On the 12th of April leave was given by the County Court Judge to amend the petition, and the hearing was adjourned to the 12th of June. The petition was accordingly amended by stating the fact that two of the signatories of the memorandum were infants, and alleging that the company was not duly incorporated, and was in fact an unlimited company. The amended petition prayed that the company might be wound up as an unregistered company under Part VIII. of the *Companies Act*, 1862; or, in the alternative, that it might be wound up as a limited company. The amended petition was duly advertised.

On the 12th of May the Petitioners took out a summons in the High Court, asking that the proceedings in the matter might be transferred to the High Court. On the 2nd of June Mr. Justice *Vaughan Williams* made an order "that the said petition now pending in the County Court of *Warwickshire*, holden at *Coventry*, be transferred to the High Court (Companies Winding-up)."

The company appealed from this order.

Beale, Q.C., and *Younger*, for the appeal:—

We submit that there was no jurisdiction to make this order to transfer a winding-up petition on which no order had been made. The *Companies (Winding-up) Act*, 1890, s. 3, gives power to transfer "the winding-up of a company, or any proceedings therein," from one Court to another Court. We say that a petition on which no order has been made is not a proceeding in a winding-up, and does not come within these words. By the Companies (Winding-up) Rules, 1890, it is provided (rule 7) that "Every proceeding in Court or in Chambers under the Acts shall be dated." Now, the presenting a petition cannot be called a

proceeding in Court or in Chambers. By rule 8, it is provided that the Judge to whom the jurisdiction to wind up companies is assigned may at any time, "for good cause shewn, order the proceedings in any Court other than the High Court to be transferred to the High Court." By rule 10, notice of an application for transfer of proceedings must be given to the Official Receiver. Now, the Official Receiver has nothing to do with the matter unless a winding-up order has been made. Rule 12 substitutes in case of a transfer the Official Receiver of the Court to which the transfer is made for the Official Receiver of the Court from which it is made, which is unmeaning unless the matter has gone so far that the Official Receiver has duties to perform; and rule 14 leads to the same inference. Taking the Act and the Rules together, they only sanction a transfer where a winding-up order has been made; "proceedings" must be understood to mean proceedings under a winding-up order. The form of order of transfer in the schedule to the Rules relates to "the said proceedings," not to the petition. There is no provision in the Act or Rules for advertising the transfer of proceedings; so if a petition could be transferred before hearing, parties who wished to be present at the hearing might come to the County Court on the day which had been advertised and learn for the first time that the proceedings were to be carried on elsewhere. Mr. Justice *Vaughan Williams* expressed an opinion that the same practice ought to be followed as in bankruptcy; but the Bankruptcy Rules are much wider than those under the *Winding-up Act* of 1890.

Supposing, however, that there is jurisdiction, we say that there is no "good cause shewn." Supposing the company turns out to be an unregistered company, there is jurisdiction in the County Court to wind it up; so, in any event, the proceedings can go on in the County Court: *Companies Act*, 1862, s. 199; *Companies (Winding-up) Act*, 1890, s. 32.

[*Levett*, Q.C., for the Respondents:—We do not dispute that.]

Then, no cause is shewn but this: the Petitioners wish to have the decision of Vice-Chancellor *Hall*, in *In re Nassau Phosphate Company* (1), reviewed; so it will be necessary to come to the

(1) 2 Ch. D. 610.

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Court of Appeal; and if the petition is heard in the High Court only one appeal will be necessary; but, if in the County Court, two appeals must be presented. No doubt, there is some advantage in that; but we say that it is a trifle compared with the expense and inconvenience of having all the proceedings under the winding-up carried on here instead of at *Coventry*. Sect. 3, sub-sect. 3, gives the County Court Judge power to state a special case for the High Court; so provision is made for dealing with any question of difficulty, and it is not desirable to incur so much extra expense for the purpose of getting a question of law decided.

Levett, Q.C., and *Eve*, for the Petitioners, were not called upon.

LINDLEY, L.J.:—

The question raised is important and new: Whether there is any jurisdiction in a Judge of the High Court exercising jurisdiction under the *Companies* (*Winding-up*) *Act*, 1890, to transfer from the County Court to the High Court a winding-up petition on which no order has been made. The facts of the case are peculiar. The memorandum of association of the company was signed by eight persons, two of whom were infants, and their names have since been struck off the register. It is in the interest of everybody concerned that if a winding-up order is made its validity should be unimpeachable, and questions arise which are not easy of solution. A creditor's petition for winding-up was presented in the County Court—a course of proceeding which, under the Act of 1890, was unquestionably right. The petition was amended by leave of the County Court, and fresh advertisements were ordered and issued; but before anything more had been done the Petitioner applied to have the petition transferred to the High Court. The application came before Mr. Justice *Vaughan Williams*, who made an order for transfer, and from that order the present appeal is brought.

The first question is whether there was jurisdiction to order the transfer. This depends on the Act of 1890, and the important clauses are sect. 1, sub-sects. 1 and 3, and sect. 3, sub-sect. 1. Sect. 1 mentions the County Court among the

Courts having jurisdiction to wind up companies; and sub-sect. 3 enacts, that where the capital of a company does not exceed £10,000, a winding-up petition must be presented in the County Court within the district of which the registered office of the company is situate. Then sect. 3, sub-sect. 1, enacts, that "the winding-up of a company or any proceedings therein may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one Court to another Court, or may be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced." Sub-sect. 2 provides who is to exercise the power of transfer; and by sub-sect. 3: "If any question arises in any winding-up in a County Court or in the Stannaries Court which all the parties to the proceeding, or which one of them and the Judge of the Court, may desire to have determined in the first instance in the High Court, the Judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination."

There are, therefore, two ways in which a case of difficulty may be dealt with, the power of transfer may be exercised, or a special case may be stated for the determination of the High Court.

It has been contended that in the present case there is no jurisdiction to adopt the former course. I cannot so construe the language of sect. 3, sub-sect. 1. It is said that the construction for which the Appellants contend is put upon the Act by the Rules. Rule 7 says that "(1.) Every proceeding in Court or in Chambers under the Acts shall be dated, and shall be intituled 'In the matter of the *Companies Acts*, 1862 to 1890,' with the name of the Court in which it is taken, and of the company to which it relates. Numbers and dates may be denoted by figures. (2.) The first proceeding in every winding-up matter shall have a distinctive number assigned to it by the proper officer, and all subsequent proceedings in the same matter shall bear the same number." This shews that in the ordinary acceptation of the

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term the petition is a "proceeding." Rule 8 provides that "a Judge of the High Court to whom the exercise of the jurisdiction to wind up companies is assigned may at any time, for good cause shewn, order the proceedings in any Court other than the High Court to be transferred to the High Court, or any proceedings in the High Court to be transferred from the High Court to any other Court. Where the transfer is to the High Court, the winding-up shall be assigned to the Judge who made the order of transfer." There is nothing there to limit the sense of the word "proceedings." Rule 9: "The Judge of any Court having jurisdiction to order the winding up of a company other than the High Court or a Palatine Court may at any time, for good cause shewn, order any proceedings which have been commenced or are pending in his Court to be transferred to any Court which has jurisdiction to order the winding-up of a company not being the High Court or a Palatine Court." Rule 10: "Notice of an application for a transfer of proceedings shall be served on the Official Receiver before the hearing thereof." Considering the scope of the Act and Rules, and the nature of the change intended to be introduced, I cannot doubt that a petition is included in the term "proceedings," and that there is jurisdiction to order a transfer though no order has been made on the petition. The language appears to me open to no reasonable doubt.

As to the second point—whether good cause is shewn—I do not attempt any definition of "good cause"; but when we look at the difficulty of the question which arises here, and the importance of the winding-up order, if made, being a valid one, I think it is desirable that the proceedings should be transferred. I am of opinion that there was jurisdiction to order a transfer and good cause shewn for ordering it, and the appeal fails.

LOPES, L.J.:—

There are two points in this case: whether there was jurisdiction to make the order, and whether good cause was shewn for making it. It has been urged that there was no jurisdiction because no order had been made on the petition, and it was said that a petition without an order was not a proceeding in the

winding-up. Sect. 3, sub-sect. 1, authorizes a transfer of "the winding-up of a company, or any proceedings therein." It seems to me clear that a petition must come within the term "proceedings." It is urged that the Rules assist the Appellants' case; but they seem to me to be against it. Rule 7, clause 2, provides that the first proceeding in every winding-up matter shall have a distinctive number assigned to it. This number would be assigned to the petition, and the language of the rule seems clearly to stamp the petition with the character of a "proceeding." I am of opinion, therefore, that there was jurisdiction to order a transfer.

Then, as to the "good cause" required by rule 8, I am of opinion that good cause for ordering a transfer was amply shewn. It is admitted that a difficult question of law arises in this case, and, that being so, it was within the discretion of the Judge to order a transfer.

A. L. SMITH, L.J.:—

I am of the same opinion. Whether we read the Act or the Rules, or the Act and Rules together, we must come to the conclusion that there was jurisdiction. The best point for the Appellants is that there is nothing in the Rules which expressly applies in a case like the present to the transfer of a petition; but that blot is not enough to outweigh the considerations arising from the language of the Act and the scope of the Act and Rules. If there was jurisdiction, I think that ample cause was shewn in this case for exercising it.

Solicitors for Appellants: *Warren, Murton, & Miller*, agents for *Woodcock & Co., Coventry.*

Solicitors for Petitioners: *Field, Roscoe & Co.*, agents for *Coley & Coley, Birmingham.*

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July 14.

In re DAVY (A LUNATIC).

Lunatic—Married Woman—Right of Husband to be appointed Committee of the Person.

The husband of a lunatic has no absolute right to be appointed the committee of her person. The Court has jurisdiction to exercise its discretion in making such an appointment as it may think best for the benefit of the lunatic.

THIS was an application for the appointment of two persons as committees of the person and estate respectively of *Laura Davy*, a lunatic.

The lunatic, who was also deaf and dumb, was married to her present husband, *J. H. P. Davy*, who was her cousin, in April, 1882, without the knowledge or consent of her parents.

In February, 1892, a petition was presented by her mother, Mrs. *Chidgey*, for an inquiry into her state of mind; and on the 24th of May, 1892, she was found to be of unsound mind.

On the 2nd of June, 1892, a summons was taken out for the appointment of her mother as committee of the estate of the lunatic, and of Mrs. *Crook*, a friend of her mother, as committee of her person. The lunatic was entitled to property, which was in the hands of the trustees of her father's will, producing about £130 annual income.

The application was supported by evidence that the lunatic was ill-treated by her husband, and had a great dread of him; that she had run away from him, and taken refuge with her mother; that he took her money, and did not support her properly; and that it would be very injurious to her health if her husband were allowed to live with her. The application was opposed by the lunatic's husband, on the ground that he had by law the right to the guardianship of his wife's person. The Master in Lunacy expressed his opinion that it would not be for the benefit of the lady that her husband should be appointed committee of her person, and that the application ought to be granted; but referred the summons to the Court. The case was accordingly argued in Court.

Crackanthorpe, Q.C., and *Colt*, in support of the application.

Cracroft, for the husband of the lunatic:—

The husband or wife of a lunatic has a right to be appointed committee of the lunatic. This was the practice in former times, and that practice has never been altered: *Lord Wenman's Case* (1); *In re Dyce Sombre* (2). If the Court cannot trust the husband to apply the income properly, it may appoint some other person a joint committee: *In re Le Heup* (3); but there is no precedent for excluding the husband altogether if he claims to be appointed.

LINDLEY, L.J.:—

This is a remarkable case. The lady, who is a lunatic, is also deaf and dumb. She was married to her cousin, who was a clerk out of employment, without the knowledge or consent of her parents; and her husband has treated her in a manner which I shall not describe, but which is such as convinces me that it would not be for her benefit that he should have the care of her. I do not hesitate to say that if the allowance to which she is entitled should be paid to him, he would put it in his pocket and spend every shilling of it upon himself. The person who is proposed as committee is a friend of the lady's mother, and is well able to take care of her. The husband opposes the application, and claims to be appointed himself, either solely or jointly with another person, on the ground that he has by law a right to the custody of his wife's person. I do not agree that he has any such right. The Court has full jurisdiction to exercise its discretion to do what is most for the benefit of the lunatic. In nine hundred and ninety-nine cases out of a thousand it would probably be for the benefit of a lunatic married woman that her husband should be appointed committee; but there may be exceptions, and in such cases the Court will exercise its discretion. In the present case, I have no hesitation in saying that the Master was right in his opinion, and that this application ought to be granted.

(1) 1 P. Wms. 701. (2) 8 Jur. 817.
(3) 18 Ves. 221.

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LOPES, L.J.:—

'I am of the same opinion. The husband has no indefeasible right to be appointed committee. If there is no precedent for the course which the Court is now taking, the sooner a precedent is made the better. The paramount object for the Court to consider in appointing a committee is the comfort and benefit of the lunatic. Could any one doubt that if the husband of this lady were appointed, and the allowance paid to him, he would continue to act as he has done, and put his wife's money into his own pocket? The application must be granted according to the summons.

Solicitors: *Torr & Co.; J. Hopkins.*

M. W.

In re LANDER AND BAGLEY'S CONTRACT.

CHITTY, J.

1892

June 1, 30; July 2.

[1892 L. 775.]

Lessor and Lessee—Agreement for Lease—Public-house—"Usual" covenants—Covenant against assignment without consent—Proviso for re-entry—Date of commencement of Term—Parol Evidence—Option to renew—Specific Performance—Vendor and Purchaser Act, 1874, *s.* 9 [*Revised Ed. Statutes, vol. xvii., p.* 289].

An agreement for the lease of a public-house, dated the 1st of April, provided for a term of three years, with an option to renew for another seven years, and for possession to be given "within one month from this date," but contained no reference as to the covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee, (1.) To reside on the premises and personally conduct the business; (2.) Not to assign without consent; and that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses:—

Held, that covenants 1 and 2 could not be insisted upon as usual covenants; and, on this point, the fact that the subject-matter of the lease was a public-house, made no difference, and that the proviso for re-entry must be limited to the case of non-payment of rent.

Henderson v. *Hay* (1) followed.

Held, also, that the commencement of the term could be collected from the agreement as a whole, and that the day possession was given—a fact on which evidence was admitted—was the date from which the lease was to commence, and consequently that there was a valid contract.

Marshall v. *Berridge* (2) discussed and applied.

Where, on a summons under the *Vendor and Purchaser Act*, 1874, objection is taken that the contract, if valid, is not one of which specific performance can be obtained, the Court will express an opinion upon the construction of the contract, and will decide any question raised at the hearing of the summons which, if left undecided, could be raised again in an action for damages.

Whether there is any difference between a lease for three years, with an option to renew for another seven years, and a lease for ten years, with an option to determine at the end of the first three, *query*.

ADJOURNED SUMMONS.

This was an application under the *Vendor and Purchaser Act*, 1874, for the purpose of settling a dispute between a lessor and a lessee, as to the terms of a draft lease of a public-house.

An agreement of the 1st of April, 1891, between *Joseph Lowe*

(1) 3 Bro. C. C. 632. (2) 19 Ch. D. 233.

CHITTY, J.
1892
In re LANDER & BAGLEY'S CONTRACT.

Lander and *John Henry Bagley*, for the tenancy of the *Swan Inn, Burslem, Staffordshire*, contained the following terms:—

1. Possession to be given to the said *J. H. Bagley* within one month from this date.

2. A lease to be granted to the said *J. H. Bagley* for a term of three years at the annual rent of £80.

3. The said *J. H. Bagley* to have the option of renewing the lease for a further term of seven years at the annual rent of £100.

4. All tenant's fixtures to be taken and paid for by the said *J. H. Bagley* at a valuation.

5. The lease to be prepared upon the above terms.

On the 10th of April, 1891, a supplemental agreement was entered into, under which, the tenant's fixtures were to be purchased, without a valuation, for £100, subject to a deduction of £10, to be expended by *J. H. Bagley* in papering and painting the inside of the house.

On the 13th of April, *J. H. Bagley* was let into possession, and paid £90 for the tenant's fixtures. When a draft of the prepared lease was sent for the lessee's approval, it contained covenants by the lessee (1.) To reside on the premises and personally conduct the business; (2.) Not to assign without consent, such consent not to be unreasonably withheld; and (3.) A proviso for re-entry extending to breaches of any of the covenants as well as for non-payment of rent.

The lessee contended that these were not "usual covenants," even in the lease of a public-house, and, as the lessor insisted upon them, took out a summons under the *Vendor and Purchaser Act*, 1874, asking that "the objections of the Applicant to the draft lease submitted to him by the Respondent under the said contract may be considered, and that the same draft may be settled by the Court."

The summons was adjourned into Court.

During the opening of the Applicant's case, an objection was taken on behalf of the Respondent, that there was nothing to shew the date from which the lease was to commence, and that, consequently, the agreement of the 1st of April was bad.

The hearing was accordingly adjourned, to enable evidence to

be filed on this point. Evidence was filed on behalf of the Applicant, shewing, that possession was actually given on the 13th of April (as stated above), and evidence was also filed by the Respondent, stating that he was only entitled to a moiety of the house, the other moiety being the property of his infant children, for whom he was guardian, and that it would be detrimental to the interests of his children that the lease should contain an option of renewal for seven years in accordance with the agreement.

The result of this evidence is more fully referred to in the judgment.

A. D. Tyssen, for the summons:—

This agreement being silent as to the covenants to be inserted in the lease, is to be taken as an agreement for a lease with "usual covenants." The covenant to reside on the premises is certainly not an usual one; the covenant against assignment without license, is not an "usual" one in ordinary leases: *Hampshire* v. *Wickens* (1); nor can it be insisted upon, though the subject-matter of the lease is a public-house: *Henderson* v. *Hay* (2); *Church* v. *Brown* (3), where Lord *Thurlow's* opinion on this point was approved (4); *Hodgkinson* v. *Crowe* (5). The proviso for re-entry must be confined to the payment of rent, and cannot be extended to apply on breach of any of the covenants.

The agreement of the 1st of April, 1891, contains a sufficient statement of the terms, to form a binding contract, of which specific performance could be obtained: *Eadie* v. *Addison* (6).

That the Court has jurisdiction, under the *Vendor and Purchaser Act*, 1874, to decide such questions as these, between lessor and lessee, seems clear from *Anderton and Milner's Contract* (7), though the report does not state under what Act the summons was taken out; and in *Re A Contract between Stephenson and Cox* (8), the Court of Appeal held that this jurisdiction existed.

(1) 7 Ch. D. 555.
(2) 3 Bro. C. C. 632.
(3) 15 Ves. 258.
(4) Ibid. 271.
(5) Law Rep. 10 Ch. 622.
(6) 31 W. R. 320.
(7) 45 Ch. D. 476.
(8) 36 Sol. J. 287.

CHITTY, J. 1892 In re LANDER & BAGLEY'S CONTRACT.

In *Anderton and Milner's Contract* (1), the proviso for re-entry was limited to non-payment of rent.

Hodgkinson v. *Crowe* (2) is to the same effect.

Mulligan, for the Respondent, the lessor:—

This application is not within the scope of sect. 9 of the *Vendor and Purchaser Act*, 1874, because here questions are raised affecting the validity of the contract altogether. The agreement of the 1st of April is void, because there is nothing to shew the date from which the lease is to commence, a most material part of the contract: *Blore* v. *Sutton* (3); *Marshall* v. *Berridge* (4), and evidence as to the commencement of the term is not admissible: *Gray* v. *Smith* (5).

Then, assuming there is a contract, the Respondent being in the position of a trustee as to a moiety of this property, has no power to grant a lease with an option to renew for another seven years; such a lease would be improvident as against the infants: *Magrane* v. *Archbold* (6); and *ultrà vires*; *Bellringer* v. *Blagrave* (7); *Oceanic Steam Navigation Company* v. *Sutherberry* (8). Specific performance of this agreement, therefore, could not be obtained, and, consequently, there is no jurisdiction under the *Vendor and Purchaser Act*, 1874, to determine the construction of this contract.

As to the covenant against assignment, the subject-matter of this lease being a public-house, it is most important that the lessor should have some control; it is the custom in the neighbourhood to insert such a covenant.

[CHITTY, J.:—Can there be a custom in the district as to usual clauses in a lease of this kind?]

The custom of a district has an important bearing on what are or are not usual covenants: *Folkingham* v. *Croft* (9), where the opinion expressed in *Henderson* v. *Hay* (10) was not acted upon. In *Hampshire* v. *Wickens* (11), the Master of the Rolls refers (12)

(1) 45 Ch. D. 476.
(2) Law Rep. 10 Ch. 622.
(3) 3 Mer. 237.
(4) 19 Ch. D. 233.
(5) 43 Ch. D. 208, 215.
(6) 1 Dow. 107.
(7) 1 De G. & Sm. 63.
(8) 16 Ch. D. 236.
(9) 3 Anstr. 700.
(10) 3 Bro. C. C. 632.
(11) 7 Ch. D. 555.
(12) Ibid. 561.

to the "usual covenants" inserted in leases of public-houses as being covenants always inserted in the leases of certain brewers. If the Court should hold that there is a binding contract, I ask for the insertion in the lease of a covenant against assignment, and no option to renew. I will not press for the other covenant as to residence.

Tyssen, in reply:—

Henderson v. *Hay* (1) was approved of in *Church* v. *Brown* (2), and is good law; it is moreover precisely in point.

[CHITTY, J.:—Is it of any use my giving an expression of my opinion as to the form in which the proposed lease is to be drawn, if the agreement for a lease is one for which you could not obtain a judgment for specific performance?]

I contend that the Respondent has not made good his objection on this point, and an expression of opinion would probably put an end to the dispute, and save expense; there is jurisdiction to do this and to give me the costs of this application if the Court is in my favour: *In re Hargreaves and Thompson's Contract* (3); in any case the Court can decide as to the validity of the agreement and so prevent this point being raised again in an action for damages should that become necessary.

[He was stopped.]

CHITTY, J.: (after stating the object of the summons, the Respondent's contention as to the covenants and proviso for re-entry which ought to be inserted in the lease, the agreement of the 1st of April and the supplemental agreement, continued):—

Now, I take it to be settled law that, upon the terms of that agreement, notwithstanding that the house is an inn, the Respondent is not entitled to have inserted in the lease the provisions for which he contends. It is scarcely necessary to go through the authorities, but I must mention them shortly, and I begin with *Henderson* v. *Hay*. That was a case before Lord *Thurlow* where the subject-matter of the agreement was a public-house; the agreement in that case was, to grant a lease of the public-

(1) 3 Bro. C. C. 632. (2) 15 Ves. 258.
(3) 32 Ch. D. 454.

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house, with other premises, upon the common and usual covenants. Lord *Thurlow* held that the common and usual covenants must mean covenants incidental to the lease, and that although the covenant not to assign without license, might be a very usual one, as he believed it was, where a brewer or vintner let a public-house, that would not make it a common covenant, and he decided that the defendant had no right to insist on a clause to restrain alienation of the property, being inserted in the lease. A similar point came before Lord *Eldon* in the case of *Church* v. *Brown* (1), where the property, however, was not a public-house, but a warehouse; and in the course of the elaborate judgments which the Lord Chancellor delivered, he fully considered the subject, and upheld and expressed his approbation of the decision in *Henderson* v. *Hay* (2). It is not necessary for me to go through that judgment as it is a well-known one. The principle on which Lord *Eldon* proceeded was, that where a man has agreed to grant a term of say twenty-one years, the Court, in framing the lease, will not insert provisions which would cut down that term to something less, without there be an express stipulation, justifying it, to be found in the contract. And he was of opinion, that the nature of the property did not make any difference. He said, in his judgment (3) "Is it then to depend upon the nature of the property? Is an agreement for the lease of a public-house, where nothing more is expressed, to be carried into execution in a different manner from an agreement as to property of another species; with regard to which, though there may not be the same reason, the landlord may have reasons, operating upon him just as powerfully, for requiring the restraint? The proposition would appear extraordinary, as to an agreement for the lease of a public-house, that the tenant was to have a more extensive interest, before a license was necessary, than he would now be entitled to in the execution of such a contract; that on account of the alteration of the general law in that respect a different decision is to be made upon the same words." He stated (4) that the law of this Court is unquestionably as Lord *Thurlow* declared in *Henderson* v. *Hay*.

(1) 15 Ves. 258.
(2) 3 Bro. C. C. 632.
(3) 15 Ves. 269.
(4) Ibid. 271.

A similar point came before the Court of Appeal in *Hodgkinson* v. *Crowe* (1), where the agreement, which related to a mining lease, was, that the lease should contain all usual and customary mining clauses: and it was decided there, Lord Justice *James* giving what, I think I may term, an emphatic judgment on the subject, that the landlord was not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on the non-payment of rent, with an expression of opinion, that the rule was not confined to mining leases.

A somewhat similar case came before Sir *George Jessel*, in *Hampshire* v. *Wickens* (2), where the agreement related to a dwelling-house in *London*, the lease to contain all usual covenants and provisoes. It was held, that the covenant not to assign without the lessor's consent was not a usual covenant. Upon these authorities, which I think it unnecessary to state at any greater length, I consider that the point is settled, and that, in the agreement before me the landlord is not entitled to insert any of the provisions for which he contends.

That was the only question between the parties, before the summons was taken out, and upon the original affidavits, when the summons was adjourned into Court. But when the case was argued, the Respondent's counsel raised an objection, which he certainly was entitled to raise, although it had not been taken before, viz., that the commencement of the term of three years was not defined by the contract, and, in support of the proposition that the commencement of the term must be shewn, he referred to the well-known case of *Blore* v. *Sutton* (3), and the decision of the Court of Appeal in *Marshall* v. *Berridge* (4). In *Marshall* v. *Berridge* the Court of Appeal overruled the decision of Sir *Edward Fry*, in *Jaques* v. *Millar* (5), where that learned Judge held that the date of the agreement was the date from which the term was to run, where there was nothing to the contrary appearing on the face of the agreement; and for reasons, which are forcibly pointed out by the Master of the Rolls in giving his

(1) Law Rep. 10 Ch. 622.
(2) 7 Ch. D. 555.
(3) 3 Mer. 237.
(4) 19 Ch. D. 233.
(5) 6 Ch. D. 153.

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judgment, the Court declined to accept that ruling, shewing, that in most cases, it would be contrary to the true intention of the parties. But the Court laid down the proposition, which is obvious, that the commencement of the term may be collected from the agreement read as a whole. So that the question is, whether I can collect, from the language of this agreement, the date from which the term is to begin. I think I can, and I think I can ascertain it without any question.

The first stipulation is, that possession is to be given within a month from the date of the agreement. Then there follows the stipulation that the term is to be for three years. Putting those two stipulations together, it appears to me to be unreasonable to hold that the term was to commence at any other time than from the date of possession, given within the month. Counsel for the Respondent, who was not deficient in taking objections in his argument, contended that there was no evidence to shew when possession was given. The date was stated, and apparently correctly stated, by the Applicant's counsel, to be the 13th of April, but that was not accepted by the Respondent's counsel. Consequently I thought it my duty to allow the matter to stand over to enable the Applicant to shew the actual date of possession. Accordingly evidence has been filed on the part of the Applicant, which shews clearly that possession was given on the 13th of April, that is within the month, and he produces a receipt, signed by the Respondent for rent, shewing that the rent ran from the 13th of April.

It is scarcely necessary to add anything to those facts, but another fact which was proved was, that in the draft lease, under the Respondent's own hand, the 13th of April was the date on which the term began. I think on the grounds that I have mentioned, laying aside the last point, that the Court can collect, from the terms of the agreement, as it stands, that the day of possession, which in fact was the 13th of April, is the day from which the term begins. I think that there is nothing in the argument presented again by the Respondent's counsel that parol evidence could not be admitted to shew the actual date on which possession was taken. I decide that point, therefore, in favour of the Applicant.

But this does not end the matter: for the Respondent, taking the opportunity which was afforded by the case standing over for evidence on the single point which I have mentioned, filed an affidavit upon which his counsel raises an entirely new point —that is, that he cannot grant the lease because it would be a breach of trust, and that it would be detrimental to the interest of his infant children, the owners of a moiety of the *Swan Inn* and premises; that a lease should be granted on the terms asked for. That evidence I should have rejected had I been asked so to do by the Applicant's counsel, but he was willing that it should be accepted, provided his evidence in reply was allowed, and the point was accordingly argued, and I must refer to it.

It is noticeable that the Respondent in these shadowy affidavits does not put forward any case upon which the Court can pronounce a final opinion, he only says that he is the duly constituted guardian of his three infant children. How he is the duly constituted guardian, I do not know one way or the other. It is quite consistent with the statements that are thus put forward, that the Respondent may have a title to grant the lease. But it is quite plain that he has not shewn what title he may have, in such a manner, as to give the Applicant an opportunity of dealing with the case on this summons. It may be, as Mr *Tyssen* has remarked, that the Respondent has some power under which he can grant the lease. I make these observations for the purpose of shewing what my conclusion is: but I cannot decide this point on the present occasion. Then there was another matter, which, in the varied arguments adduced for the Respondent was brought forward, which was this: it was argued that it must necessarily be a breach of trust to grant a lease for a term of three years at a rent of £80 a year, with an option, on the part of the tenant to continue for another seven years, or less term, at an increased rent. It would take a good deal of argument to convince me of the soundness of that proposition. As at present advised I do not see any substantial difference between an agreement to let for ten years, with the power to the tenant to determine it at the end of three years, or an agreement to let for three years with the power to the tenant to continue for another seven years. But I will leave this point

CHITTY, J. 1892 In re LANDER & BAGLEY'S CONTRACT.

open, because I do not think that I am in a position, on the present materials, to decide the question, whether the Applicant is or is not entitled to specific performance. If, however, I clearly saw that the Respondent could resist specific performance, then I consider that there would still be a question that ought to be decided on this summons, because the argument for the Respondent is, that by reason of the beginning of the term not having been sufficiently shewn on the agreement, there is no agreement at all, and certainly by deciding that point I shall advance matters, whatever might be the result of any further contest between the parties; because my decision will shew that there is a valid subsisting agreement, and an agreement upon which, if specific performance cannot go as a proper remedy, still an action at law can be brought against the Respondent, in which such damages as the law would allow could be recovered against him. I am by no means persuaded that the Respondent will, after this judgment, consider it expedient to contest the matter further, because it must be remembered that he has not only let the Applicant into possession upon the terms of the agreement, but he has taken the £100, *minus* the deduction of £10, as was mentioned in the supplemental agreement, from the Applicant in respect of the fixtures and fittings, and I very much question whether the Respondent will be advised to resist specific performance and leave himself open to an action for damages.

The result is that the Applicant succeeds on the summons, and I will make a declaration to the effect that I have stated, viz., that upon the true construction of the agreement the term to be granted commences on the 13th of April, 1891, the day on which possession was given.

I will also make a declaration in the Applicant's favour in regard to the covenants for residence on the premises, and against assignment and the proviso for re-entry, and there I stop. I observe that the summons asks, that the lease may be settled; I think in any view of the case, the parties would hardly desire to go to the expense of having the lease settled, and if there should be no specific performance, an event which I am bound to contemplate, although I think it is an unlikely one, then the

expense of settling the lease will be thrown away. But what I will do is this. Having made these declarations I will order the Respondent to pay the costs up to and including this order, and I will give liberty to either party if so advised, to apply to have the lease settled by the Judge.

Solicitors: *M. A. Orgill*, agent for *Empson Alcock, Burslem; Smiles, Ollard; & Yates.*

W. C. D.

NORTH, J.
1892
May 10.

In re ATKINSON.
WILSON *v.* ATKINSON.

[1891 A. 1556.]

Will—Construction—Gift of Real and Personal Estate in trust for A., B., and C., and for their respective Heirs, Executors, Administrators, and Assigns—Joint Tenancy or Tenancy in Common—Lapse.

A testator gave the residue of his real and personal estate to trustees, in trust for his nephews, *J.*, *T.*, and *G.*, and for their respective heirs, executors, administrators, and assigns. *J.* died before the testator. *G.* died after the testator, an infant and unmarried:—

Held, on the authority of *Ex parte Tunner* (1) and *Doe* v. *Green* (2), that the nephews were joint tenants for their lives and the lives of the survivors and survivor, with several remainders to them as tenants in common, and that *T.* was entitled to the income of the whole for his life:

Held also, that the share in remainder of *J.* lapsed, by reason of his death before the testator, and devolved as on an intestacy.

Gordon v. *Atkinson* (3) distinguished.

ORIGINATING SUMMONS to determine questions arising upon the construction of the will of *Thomas Atkinson*, deceased.

The testator by his will, dated the 11th of March, 1885, devised and bequeathed all his real and personal estate to two trustees, upon trust to raise and pay his funeral and testamentary expenses and debts, legacy and succession duty, and legacies thereinbefore given, and, subject as aforesaid, upon trust to permit his daughter *Mary Elizabeth Davidson*, the wife of *Gawin Davidson*, to have and enjoy during her life, as her separate property, the said trust premises, or the rents and net annual income thereof; and after the decease of his daughter the testator directed that the trust premises should be held by his trustees upon trust for her child or children as therein mentioned; and, subject and without prejudice to the trusts aforesaid, the testator directed that the trust premises should be held by his trustees, in trust for his nephews, *John Atkinson*, *Thomas Atkinson*, and *Gawin Atkinson*, and for their respective heirs, executors, administrators, and assigns.

(1) 20 Beav. 374. (2) 4 M. & W. 229.
(3) 1 De G. & Sm. 478.

The nephew *John Atkinson* died on the 19th of June, 1888, before the testator. The testator died on the 4th of August, 1888. He left both real and personal estate. His daughter, Mrs. *Davidson*, was his heiress-at-law. She died on the 17th of May, 1889, intestate, a widow, and without issue, leaving four co-heiresses. The nephew *Gawin Atkinson* died on the 28th of March, 1889, an infant, and unmarried.

The questions to be decided were (1.) whether the share of the testator's residuary real and personal estate, given by his will in trust for his nephew *John Atkinson*, lapsed by reason of his death in the lifetime of the testator, and who was entitled to that share; (2.) whether the nephew *Thomas Atkinson*, as the survivor of the three nephews named, was entitled for his life to the share of the residuary real and personal estate given by the will in trust for the nephew *Gawin Atkinson*.

The Plaintiffs were the executors and trustees of the will; the Defendants were, the nephew *Thomas Atkinson* (who was also heir-at-law and one of the next of kin of the nephew *Gawin Atkinson*); *Margaret Atkinson*, the mother and another of the next of kin of *Gawin Atkinson*; the co-heiresses-at-law of Mrs. *Davidson*, who were also now the co-heiresses of the testator; and the legal personal representative of Mrs. *Davidson*.

Sebastian, for the Plaintiffs, referred to *Ex parte Tanner* (1); *Torret* v. *Frampton* (2); *Doe* v. *Green* (3); *Gordon* v. *Atkinson* (4); *In re Moore's Settlement Trusts* (5).

R. F. Norton, for the nephew *Thomas Atkinson*:—

There is a joint tenancy for life, and *Thomas Atkinson* takes the income of the whole residue for his life. *Ex parte Tanner* is precisely in point, and *Doe* v. *Green* is an authority for the same construction. In *Gordon* v. *Atkinson* there was only personal estate. *Torret* v. *Frampton* is distinguishable.

Colt, for the other Defendants:—

The construction must be the same as regards both real and

(1) 20 Beav. 374.
(2) Sty. 434.
(3) 4 M. & W. 229.
(4) 1 De G. & Sm. 478.
(5) 31 L. J. (Ch.) 368.

NORTH, J.
1892
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WILSON v. ATKINSON.

personal estate. The Court now favours a tenancy in common. "Respective heirs, &c." must mean the heirs, &c., of each nephew as he dies. In *Doe* v. *Green* (1), the devise was "to my nieces *E.* and *J.*, equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever," and it was held that the nieces took estates as joint tenants for life, with several inheritances on the death of the survivor.

NORTH, J.:—

The will deals with both real and personal estate, and I do not think any distinction can be drawn between the two. What, then, is the meaning of the words which the testator has used? They are technical words, upon which the Court has put a technical construction, and I must follow it. If there had been no authority to the contrary, I should have been inclined to hold that the nephews were tenants in common in fee. But I am unable to find any distinction between this case and *Ex parte Tanner* (2) and *Doe* v. *Green*, which, I think, govern the construction. I have felt some difficulty as to *Gordon* v. *Atkinson* (3), because Vice-Chancellor *Knight Bruce* did not point out any distinction between that case and the others to which I have referred. But I think he must have based his decision upon the different language of the will which he was construing. The words of the will in that case were, "to pay, assign, and transfer the same trust moneys, stocks, funds, and securities" unto four persons named, "and to each of their respective heirs, executors, administrators, and assigns," and if money is to be paid to persons who take an absolute interest it is difficult to see how you are to pay them as joint tenants. They must take as tenants in common, unless the fund is retained by the trustees. I think, therefore, that the Vice-Chancellor must have proceeded upon the difference between the language of that will and that of the will in *Doe* v. *Green*. I must follow *Doe* v. *Green* and *Ex parte Tanner*. I hold, therefore, that the Defendant *Thomas Atkinson* takes the whole income for his life. As the nephew *John* died before the testator, his share lapsed, and devolved as

(1) 4 M. & W. 229. (2) 20 Beav. 374.
(3) 1 De G. & Sm. 478.

on an intestacy of the testator. Subject to the life estate of *Thomas* in the whole, the other two shares passed to him and *Gawin* as tenants in common.

Solicitors: *Pattison, Wigg & Co.*, agents for *Chartres & Youll, Newcastle-upon-Tyne.*

W. L. C.

In re TRUBEE'S TRUSTS.

NORTH, J.
1892
May 14.

[1892 T. 0167.]

Trustee—Vesting Order—Stock standing in Sole Name of Deceased Person Personal Representative out of Jurisdiction—Trustee Act, 1850, *ss.* 24, 25 [*Revised Ed. Statutes, vol. x., p.* 988].

Under sect. 25 of the *Trustee Act*, 1850, the Court has power to make a vesting order in relation to stock standing in the sole name of a domiciled Scotchman whose executor has proved his will in *Scotland*, but has not proved it in *England*, and who is resident in *Scotland*.

PETITION under the *Trustee Act*, 1850, for a vesting order.

Henry Trubee, by his will, dated the 11th of April, 1870, gave, devised, and bequeathed all the residue of his estate and effects unto *J. T. Simpson* and *James Anderson*, their heirs, executors, administrators, and assigns, upon the trusts therein declared. The testator appointed the same two persons his executors. The testator died on the 29th of September, 1871. The will was proved by the executors. *J. T. Simpson* died on the 2nd of March, 1887. On the 19th of September, 1889, a deed was executed between *Anderson*, of the one part, and *W. H. Simpson* and *F. J. Manger* of the other part. This deed contained recitals to the effect, that the securities mentioned in the schedule thereto were the securities then representing the testator's estate; that *Anderson* was desirous of being discharged from the trusts of the will, and of appointing *W. H. Simpson* and *Manger* to be trustees thereof in the place of himself and *J. T. Simpson*; and that the securities specified in the schedule were intended to be forthwith transferred into the joint names of *W. H. Simpson* and *Manger*. And *Anderson* did thereby appoint *W. H. Simpson* and *Manger* to be trustees of the will in the place of *Anderson* and *J. T.*

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Simpson, for all the purposes of the will, or such of them as were subsisting. And it was declared that *W. H. Simpson* and *Manger* should hold the said securities, when the same should have been transferred into their names, upon the trusts, and with and subject to the powers and provisions, applicable thereto by virtue of the will, so far as the same were then subsisting. By accident *Anderson* omitted to transfer to the new trustees two of the securities mentioned in the schedule to the deed, *viz.*, a debenture for £300 of the *Scottish Australian Investment Company*, and a sum of £75 Consolidated Stock of the *Royston and Hitchin Railway Company*. *Anderson* died on the 22nd of August, 1890. He was domiciled in *Scotland*, and his will was made in the Scotch form. A confirmation of his will was duly obtained in *Scotland* by *Malcolm McGregor* and *Richard Watson*, the executors thereby appointed. The Scotch confirmation had not been resealed in *England*.

The petition was presented by *W. H. Simpson* and *Manger*. It stated that the Petitioners had requested the representatives in *Scotland* of the estate of *Anderson* to cause the confirmation of his will to be resealed in *England*, and to transfer to the Petitioners the sum of £300 secured by the said debenture, and the said sum of railway stock, but that they had refused to do so.

The petition prayed that the right to transfer the sum of £300 secured by the said debenture, and the said sum of £75 railway stock, and to receive all dividends due and to accrue due thereon, might vest in the Petitioners as the trustees of the will of *H. Trubee*.

MacSwinney, for the Petitioners:—

Sect. 25 (1) of the *Trustee Act*, 1850, applies. The Scotch

(1) Sect. 24: "Where any one of the trustees of any stock or *chose in action* shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such *chose in action*, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose in action*, in the other trustee or trustees of the said stock or *chose in action*, or in any person or persons whom the said Court may appoint

executors, though they have not proved the will in *England*, are "personal representatives" within the meaning of the section, and they are out of the jurisdiction: *Re Ellis' Settlement* (1); *In re Stroud's Trusts* (2); *In re Price's Settlement* (3). In the latter case the executrix of the surviving executor of the survivor of two trustees of a settlement had not proved the will of her testator, and *Bacon*, V.-C., on the petition of the tenant for life of the fund, appointed the petitioner trustee of the fund, and ordered that the right to transfer the fund and to receive the dividends thereof should vest in her. Here the Scotch executors might have proved the will in *England*, and they have not done so, and they stand in the same position as an English executor who has not proved his testator's will in *England*.

NORTH, J.:—

I will follow *In re Price's Settlement*, and treat the personal representatives in *Scotland*, who are entitled to prove the will in *England*, but have not done so, as personal representatives within sect. 25. If evidence is produced to the Registrar that these persons are the personal representatives of the testator in *Scotland*, and that they are out of the jurisdiction, the vesting order may go.

When the affidavit was produced to the Registrar, it appeared that the Scotch executors were not, as had been stated, both resident in *Scotland*, but that *McGregor* was resident in *Scotland*,

jointly with such other trustee or trustees."

Sect. 25: "When any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint."

(1) 24 Beav. 426.

(2) W. N. (1874) 180.

(3) W. N. (1883) 202.

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and *Watson* was resident in *England*, and that the debenture was standing in the name of *Anderson*, and the railway stock was standing in the names of *J. T. Simpson* and *Anderson*, as executors of *Trubee*. The Registrar, however, drew up the vesting order without further reference to the Court.

The material part of the Order as drawn up was as follows:—

And it appearing to the satisfaction of the Court that the debenture numbered 928 of the *Scottish Australian Investment Company, Limited*, for £300, is standing in the name of the said *James Anderson*, as survivor in a joint account with the said *James Tennant Simpson*, deceased, and that £75 Consolidated Stock of the *Royston and Hitchin Railway Company* is standing in the names of the said *James Tennant Simpson* and *James Anderson*, as executors of the said *Henry Trubee*, in the books of the respective companies, and that *Malcolm McGregor* and *Richard Watson*, the persons entitled to take out representation in *England* to the estate of the said *James Anderson*, have refused to take out such representation, and that the said *Malcolm McGregor* is resident in *Scotland* out of the jurisdiction of this Court, and that the said *Richard Watson* has refused to transfer the said debenture and Consolidated Stock according to the direction of the persons entitled thereto for the space of twenty-eight days next after a request in writing for that purpose has been made to him by the Petitioners, and that the Petitioners have been appointed trustees of the will of the said *Henry Trubee*: This Court doth order that the right to call for a transfer of, and to transfer, the £300 secured by the said debenture No. 928 of the *Scottish Australian Investment Company, Limited*, standing in the name of *James Anderson*, as survivor in a joint account with the said *James Tennant Simpson*, deceased, in the books of the said company, and £75 Consolidated Stock of the *Royston and Hitchin Railway Company*, standing in the names of the said *James Tennant Simpson* and *James Anderson*, as executors of *Henry Trubee*, deceased, in the books of the said company, and to receive all dividends now due and to accrue due thereon, do vest in the Petitioners, as the trustees of the will of the said *Henry Trubee*. And it is ordered that the Petitioners do transfer the said debenture and stock into their own names accordingly.

Solicitors: *Simpson, Rawson, & Co.*

W. L. C.

In re WENHAM.
HUNT *v.* WENHAM.

[1891 W. 1559.]

NORTH, J.
1892
May 31.

Executor—Administration—Claim against Estate—Statute of Limitations—Right of Residuary Legatee to require Executor to plead Statute—Originating Summons—Rules of Supreme Court, 1883, *Order* LV., *rr.* 3, 4.

The executors of a will took out an originating summons under rules 3 and 4 of Order LV., asking for the determination, without administration of the estate, whether the first Defendant was a creditor upon the estate to any and (if so) what amount. The other Defendant was the residuary legatee. The claim of the first Defendant was, in fact, barred by the *Statute of Limitations*, but the executors had not set up the statute, and did not intend (unless so directed by the Court) to set it up; but they desired on other grounds to have the claim investigated by the Court:—

Held, that the parties must be treated as standing in the same position as if under the old practice an administration decree had been made, and that, consequently, the residuary legatee was entitled to insist on the statute being set up as a defence to the claim.

ORIGINATING SUMMONS by the executors and trustees of the will of *Laura Wenham.*

The Defendants were *Emily Wenham*, a specific legatee named in the will, who also claimed to be a creditor upon the estate of the testatrix, and *W. D. Stone*, who was the residuary legatee named in the will.

The summons asked (*inter alia*) for the determination, under rules 3 and 4 of Order LV. of the Rules of the Supreme Court, 1883, without administration of the estate, of the question whether the Defendant *Emily Wenham* was a creditor upon the estate of the testatrix to any and (if so) what amount; and if, and so far as, necessary, to have an account taken of the debts of the testatrix.

S. Hall, Q.C., and *G. C. Price*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the residuary legatee:—

The residuary legatee desires that the executors should plead

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the *Statute of Limitations*. If they do so, the claim of *Emily Wenham* will be barred. If they will not plead it, we ask for leave to issue at once a summons for the administration of the estate, and that the common order for administration may be made now. Then the statute must be set up.

S. Hall:—The executors do not intend to plead the statute unless the Court thinks that they ought to do so. They wish that the amount of the claim should be ascertained by the Court.

Kemp, Q.C., and *Maidlow*, for *Emily Wenham*:—

The statute ought not to be pleaded now. The executors might have paid the debt. An executor is not bound to set up the statute against a creditor He may retain a debt due to himself, though it is statute barred: *Hill* v. *Walker* (1); *Darby* and *Bosanquet* on the *Statutes of Limitations* (2).

No doubt after a decree has been made for the administration of the estate the executor cannot ignore the statute if the residuary legatee insists on its being set up: *Shewen* v. *Vanderhorst* (3). No judgment for administration has yet been pronounced. The residuary legatee has never, till now, said that he wished the statute to be set up. The executors have declined to raise that defence to the claim; and the question which the claimant has come here to argue is, whether, apart from the statute, her claim is valid.

[NORTH, J., referred to *Alston* v. *Trollope* (4); *Lord Castleton* v. *Lord Fanshaw* (5).]

Any one who desires to set up the statute ought to plead it. Under the old practice the discretion of the executor was in no way fettered until a decree for administration had been made. The object of rule 3 of Order LV. was to avoid the necessity of obtaining an administration decree, and to enable the Court to decide questions arising in the administration of an estate in a summary manner without administration of the estate—that

(1) 4 K. & J. 166.
(2) Pages 13, 16.
(3) 1 Russ. & My. 347.
(4) Law Rep. 2 Eq. 205.
(5) Prec. Ch. 99.

is, without the Court taking on itself the control of the assets, without the executors being bound by a decree or judgment. The executors are now asking the Court, whether, independently of the statute, this claim is an honest one. They do not set up the statute. There is no reason why the case should be treated as if an administration decree had been obtained.

NORTH, J.:—

I think the case must be dealt with for this purpose just as if the Court were administering the estate; and although an order for administration has not been made, and the parties have been saved the expense of an administration by the Court so far as it is unnecessary, I think the present point must be dealt with just as if there were a full decree for administration of the estate by the Court. Under the old practice the validity of a claim against an estate could only have been investigated after a decree for administration had been made; when that had been done, the residuary legatee would have been entitled to insist on the *Statute of Limitations* being raised as a defence to a claim which would be barred by it. I think the parties must now be treated as standing in the same position, as regards the defence of the statute, as they would have done if an administration decree had been made, and that, consequently, the residuary legatee is entitled to raise the defence of the statute. Rule 3 was intended to dispense with those formal and unnecessary steps in an administration suit which were of no advantage to any one, and were of great disadvantage to those whose money was spent in paying the costs. If the residuary legatee were not entitled to set up the statute now, I do not see how I could refuse his application for leave to issue a summons for administration, and to have an order for administration made now, so that he might have the benefit of the statute as a defence to this claim. The question remains open whether the conduct of the residuary legatee has been such as to deprive him of the right to avail himself of the statute.

Kemp:—I must admit that there is no evidence of such conduct. But the claimant should be allowed her costs out of the estate.

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Vernon R. Smith, for the residuary legatee:—The claimant ought to pay costs, or if not the executors should pay them.

NORTH, J.:—I think it would not be just to make the claimant pay the costs of a proceeding commenced by the executors, nor to order them to be paid out of the residue. I do not think I ought to order the executors to pay those costs. The claimant must bear her own costs.

S. Hall:—The executors ought not to be deprived of their costs; they were neutral as regards the statute: *In re Baker* (1), in which Lord Justice *Cotton* said (2), "There may be circumstances that render it morally wrong to plead the statute, and a defence under the statute is never looked upon with any great favour."

Vernon R. Smith:—If the executors had pleaded the statute, the costs would have been saved.

NORTH, J.:—I think I must allow the executors their costs of the summons out of the estate. They might, if they had pleased, have paid the claim, waiving the defence of the statute. If they had done that, they would clearly have done no wrong. They did not adopt that course, but they declined to act without the direction of the Court. They left the matter to the Court. I can see no reason for depriving them of costs.

Solicitors: *T. A. Capron; Lewis & Lewis; Ford, Lloyd & Co.*

(1) 44 Ch. D. 262. (2) 44 Ch. D. 270.

W. L. C.

In re DAVIES.
DAVIES *v.* DAVIES.

[1891 D. 2248.]

NORTH, J.
1892
June 30.

General Power of Appointment—Exercise by Will—Power to be exercised by Will referring to Subject-matter—Policy of Life Assurance—Provision for Wife and Children of Assured—Power of Nomination by Assured—Will not referring to Policy—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35.]

A policy of insurance was effected with a society the rules of which provided, that the assurer might nominate any person to receive the sum assured, and that, if no nomination should be existing when the sum assured should become due, that sum should be paid to the assigns (if any) of the assurer, so far as the claim of such assigns should extend, in every case where such claim should have arisen under any disposition or charge made by the assurer specifically affecting such sum, or any part thereof, either by express reference thereto, or by reference generally to sums due upon assurances, whether such disposition or charge should have been made by deed, will, or other instrument or writing. In case there should not be any nomination, nor any such disposition or charge existing in respect of the sum assured when due, such sum should be paid to the widow of the assurer, or, if he should not leave a widow, to his children living at his death in equal shares. The assured never made any nomination, disposition, or charge affecting the policy, except so far as the gift of the residue of his estate contained in his will operated as a disposition affecting the policy. By his will he appointed his three daughters to be the trustees and executrices thereof, and he devised and bequeathed the residue of his real and personal estate to his trustees, upon trusts for sale and conversion, and to hold the proceeds upon trust for division into four equal parts, three of which were to be paid to the three daughters respectively, and the fourth was to be invested for the benefit of the widow and children of a deceased son of the testator. The will did not refer either expressly to the policy, or generally to sums due upon assurances. The three daughters survived the testator:—

Held, that the provisions of the policy were valid; that the power of disposition by will had not been exercised; and that the three daughters were entitled to the policy money in equal shares.

SPECIAL CASE stated for the opinion of the Court under Order XXXIV. of the Rules of the Supreme Court, 1883.

On the 9th of March, 1847, the Rev. *Edward Davies*, clerk in Holy Orders, effected an assurance upon his life with the *Clergy*

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Mutual Assurance Society for the sum of £500. The policy provided that, if he should duly during his life pay to the society the stipulated premium, the funds of the society should, conformably to the rules and regulations of the society, be subject and liable to pay within three calendar months after his decease, to the person or persons entitled thereto under the rules and regulations of the society, the sum of £500. And it was thereby provided that the policy and the assurance thereby effected should be subject to the several conditions, rules, and regulations thereupon indorsed, and to the other rules and regulations of the society, so far as the same should be applicable, in the same manner as if the same respectively were repeated and incorporated in the policy. The indorsed conditions and regulations provided that all members should be deemed to have full notice of the rules and regulations of the society, and that every assurer was a member of the society; and power was given to any member of the society to nominate any person or persons, his, her, or their executors, administrators, or assigns, to receive any sum assured by such member, or any part thereof. And it was provided, that if no nominee should have been appointed, or, having been appointed, such nominee should have died during the life of the assurer, and no new nomination should have been made thereupon, the provision at death when due should be paid to the widow of the assurer (if such survived), and if not, then that it should be paid to the children of the assurer living at his or her death, if more than one in equal shares, and if only one then that the whole should be paid to such one, and that if there should be no such child, then to the surviving husband (if any) of the assurer, or, if the assurer should be a man, or, being a woman, should not leave a husband surviving her, then to the next of kin of the assurer under the statute for distribution of the effects of intestates.

After the passing of the Act 13 & 14 Vict. c. 115, some alterations were made in the rules of the society affecting the provisions as to nomination subject to which the above policy was issued.

Mr. *Davies* did not make any nomination, and it is, therefore, unnecessary to state these provisions in detail.

The rules contained the following further provisions:—

Part. I. "In relation to assurances upon life (D or DD) made before the 15th of August, 1850:—

"Every sum assured as a provision at death by an assurance (D or DD) made before the 15th of August, 1850, when due shall be paid as follows, that is to say:—

"In case there shall be any nomination duly registered existing in respect of the sum assured when due, or of any part thereof, such sum, so far as such nomination shall extend, shall be paid to the nominee or nominees. Provided always, that, if such nomination shall not have been registered before or upon the 1st of March, 1851, such sum shall be paid to the assigns, if any, of the assurer in preference to the nominee or nominees, so far as the claim of such assigns shall extend, in every case where such claim shall have arisen under any disposition or charge made by the assurer specifically affecting such sum, or any part thereof, either by express reference thereto, or by reference generally to sums due upon assurance, whether such disposition or charge shall have been made by deed or by any other instrument or writing not testamentary, provided such disposition or charge shall have been so made before such nomination shall have been registered, but not otherwise.

"And in case there shall not be any nomination duly registered existing in respect of the sum assured when due, or so far as no such nomination shall extend, such sum shall be paid to the assigns (if any) of the assurer, so far as the claim of such assigns shall extend, in every case where such claim shall have arisen under any disposition or charge made by the assurer specifically affecting such sum, or any part thereof, either by express reference thereto, or by reference generally to sums due upon assurances, whether such disposition or charge shall have been made by deed, will, or codicil, or by any other instrument or writing.

"And, in case there shall not be any nomination duly registered, nor any such disposition or charge as aforesaid, existing in respect of the sum assured when due, or so far as no such nomination and no such disposition or charge shall extend, such sum shall be paid to the widow of the assured, the assurer being

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a male; or, if the assurer shall be a female, or, being a male, shall not leave a widow, then to the child or children of the assurer living at his or her death, if more than one in equal shares, and if only one the whole to such one; and if there shall be no such child, then to the surviving husband of the assurer, the assurer being a female; or if the assurer shall be a male, or, being a female, shall not leave a husband surviving her, then to the executors, administrators, or assigns of the assurer."

Mr. *Davies'* policy was in Class D. He never made any nomination, disposition, or charge affecting the policy, except so far as the disposition of the residue of his estate made by his will (hereinafter stated) operated as a disposition affecting the policy.

By his will, dated the 4th of October, 1889, the testator appointed his three daughters, *Amelia Ward Davies*, *Maria Hunt Davies*, and *Anne Eliza Davies*, trustees and executrices thereof. The will contained a recital that, by two indentures of settlement made on the testator's marriage, and dated the 5th of June, 1833, certain powers of appointment of the property subject to the trusts of those deeds were conferred upon and were then vested in him, and that he was desirous of exercising those powers; and he thereby appointed all the funds and property remaining subject to those deeds, and also devised and bequeathed the residue of his real and personal estate unto and to the use of his said trustees upon trusts for sale and conversion, and to hold the proceeds upon trust, as to one fourth part, for his daughter *Amelia Ward Davies* absolutely, as to one fourth part for his daughter *Maria Hunt Davies* absolutely, and as to one fourth part for his daughter *Anne Eliza Davies* absolutely; and the testator directed that the remaining fourth part (except so much thereof as should be derived from or form part of the property comprised in the two settlements or either of them) should be invested by his said trustees, and that they should pay the income thereof to *Isabella Thurburn Davies*, the widow of his deceased son, *W. E. Hunt Davies*, for her life, or until she should marry again; and from and after her death or second marriage, whichever event should first happen, he directed the trustees for the time being of his will to pay and divide the last-mentioned fourth part of his residuary real and personal

estate unto and amongst all and every the children of his deceased son who, being sons, or a son, should attain twenty-one, or, being daughters or a daughter, should attain that age or sooner marry, in equal shares as tenants in common. The testator also appointed the remaining unappointed fourth part of the property comprised in the two indentures of settlement, or either of them, in the same way to the children of his deceased son; and, in the event of the deaths of all those children without obtaining a vested interest under the last appointment, then he appointed the last-mentioned fourth part of the property comprised in the two indentures of settlement, or either of them, unto and amongst his three daughters in equal shares.

The testator survived his wife, and died on the 25th of July, 1890.

The Plaintiffs in the special case were the testator's three daughters, and they were his only children who survived him.

The Defendants were the widow and three infant children of the deceased son, the three infants being his only children.

The testator kept up the policy to the time of his death, and on the 2nd of October, 1890, the Plaintiffs received from the society the sum of £982 in respect of the policy (including bonus additions).

The question for the opinion of the Court was, whether the money received under the policy constituted part of the residuary estate of the testator, or whether the Plaintiffs were solely entitled thereto.

Eve, for the Plaintiffs:—

The proceeds of the policy are not disposed of by the will, and, therefore, by the rules of the society, which are incorporated in the policy and form part of the contract, they belong to the Plaintiffs. Sect. 27 of the *Wills Act* does not apply, because the power of appointment by will can be exercised only by a will referring either expressly to the policy or generally to sums due upon assurances. Such a limitation of the power of appointment is valid: *Phillips* v. *Cayley* (1).

(1) 43 Ch. D. 222.

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Bardswell, for the Defendants:—

The contract contained in the policy is an illegal one, and is void. It is contrary to public policy, because its effect is to take the fund out of the testator's personal estate and to prevent its being available for the payment of his debts. The testator retained some control over the policy; he might have sold it or surrendered it, and have put the proceeds into his pocket.

[NORTH, J., referred to *In re Flavell* (1).]

In that case an absolute trust was created by the partnership articles for the testator's widow. There is no such absolute trust for the testator's children here. In *Ashby* v. *Costin* (2), the assured died intestate.

On the true construction of the will the testator has shewn an intention not to die intestate as to any of his property; he intended to exercise his power of appointing the policy money.

NORTH, J.:—

In my opinion there can be no doubt about this case. I think it is covered by authority, if authority were needed. [His Lordship stated the facts, including the provisions of the policy and the rules, and continued:—]

Mr. *Davies* did not make any nomination in his lifetime. If he had not left any child surviving him, the proceeds of the policy would, in my opinion, have been his property. He could have disposed of them as he pleased, and they would have passed under his will. But he had made a contract—which, I think, was perfectly legal—that the proceeds should go to his surviving children if he did not divert the same from them in a mode which he might have adopted but which he did not adopt. It is said that this contract is illegal and void on the ground of public policy, because the effect of it is to withdraw the fund from paying his debts. I do not see that it does so. He might have sold the policy in his lifetime. He might have bequeathed it by his will to his executors; or, by the use of apt words in his will, he might have rendered the proceeds of the policy available

(1) 25 Ch. D. 89. (2) 21 Q. B. D. 401.

for the payment of his debts. There is, therefore, nothing in the contract contrary to public policy. And, moreover, if there had been anything illegal as regards creditors, it must be remembered that the present claim is set up, not by creditors of the testator, but by persons who derive their title under his will. As against persons who claim under the will, the contract must be effectual. In my opinion, *Phillips* v. *Cayley* (1) is a distinct authority that such a limitation of the testator's power of appointing by will is perfectly legal. It is valid as regards persons claiming under the will. But I think it would also be valid as against the creditors of the assured, on the principle on which *In re Flavell* (2) was decided. *Ashby* v. *Costin* (3) is completely adverse to the contention of the Defendants. I can see no difference between the death of an assured intestate as to the policy of insurance and his death leaving a will by which he does not exercise the only power which he has of disposing of the proceeds of the policy. Here the testator did not insert in his will words which he might have inserted and which would have operated to pass the proceeds of the policy. I do not entirely assent to the language used by Mr. Justice *Cave* in *Ashby* v. *Costin*, that the money was "not the property" of the assured. He had a contingent interest which would have become absolute on the happening of a certain event, which however did not happen. In the events which did happen, the testator's three daughters are entitled to the policy money by virtue of the special contract between him and the insurance company. He might have defeated their claim in a particular way, but he has not done so.

Solicitors: *Shaw, Tremellen, & Kirkman; Bourne & Belfield.*

(1) 43 Ch. D. 222. (2) 25 Ch. D. 89.
(3) 21 Q. B. D. 401.

W. L. C.

NORTH, J.
1892
July 15.

ATTORNEY-GENERAL v. NORTH METROPOLITAN TRAMWAYS COMPANY.

[1892 A. 657.]

Practice—Discovery—Affidavit as to Documents—Interrogatories—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 1, 12.

An action was brought by the attorney-general at the relation of numerous tram-car manufacturers to restrain a tramway company incorporated by Act of Parliament from manufacturing and supplying rolling-stock to other companies by means of capital not authorized to be so applied.

The Court refused to order the Defendants to make an affidavit of documents; but allowed the Plaintiffs to interrogate as to what capital the Defendants were employing in such manufacture.

THIS was an action by the Attorney-General at the relation of fifteen limited companies, who were also co-Plaintiffs. The relators were members of the *Railway Carriage and Waggon Builders' Association*, an association formed with the object of protecting the interests of persons engaged in the trade of railway carriage, tram-car, and waggon manufacture.

The Defendant company were incorporated by Act of Parliament passed in 1869. By the *North Metropolitan Tramways Act*, 1885, s. 40, it was enacted that, "The company may, with the consent of not less than three-fourths of the votes of the shareholders present in person, or by proxy, at a meeting convened with special notice of the purpose, manufacture, provide, sell, and let on hire, tramway rolling-stock and tramway and other carriages and vehicles, and the harness, fittings, and appliances of every description connected with the equipment, working, and use of tramways, and may use for that purpose their existing works, manufactories, buildings, and appliances at *Leytonstone*, and the staff, officers, servants, and workmen employed by them at those works, if and whenever such staff officers, servants, and workmen are not fully employed in the manufacture of such rolling-stock and appliances as aforesaid for the use of the company, and the company may agree with any other tramway company, or any person, with reference to the sale, hire, or supply of

any such rolling-stock, carriages, harness, fittings, and appliances for the use of such other company or person, or with reference to any of the matters aforesaid. Provided always, that the powers conferred by this section shall not without the further authority of Parliament be exercised after the expiration of five years from the passing of this Act, and provided also that the company shall not raise or expend any additional capital for the purposes of this section."

By Acts passed in 1887 and 1890, the Defendant company were empowered to raise additional capital; but it was provided that nothing in either of the last-mentioned Acts should authorize the Defendant company to apply the additional authorized capital for the purposes of sect. 40 of the *North Metropolitan Tramways Act*, 1885. By the Act of 1890, it was provided that the powers conferred by sect. 40 of the Act of 1885 might be exercised for ten years longer.

The Plaintiffs had delivered a statement of claim by which it was alleged that it appeared from returns furnished by the Defendant company to the Board of Trade and their own balance-sheets that the company had expended on capital account, by the end of 1889, all the capital they had down to that date power to raise.

The statement of claim alleged that the Defendant company, in the year 1891, constructed at their works at *Leytonstone* ten tram-cars, which were supplied to another metropolitan tramways company, and that the expenditure upon such cars was made out of capital money not authorized to be so applied, that all capital authorized to be applied for that purpose had been expended, and there was no capital of the Defendant company which could be lawfully so expended. The Plaintiffs claimed an injunction to restrain the Defendant company from supplying, selling, or letting on hire, tramway rolling-stock, from using their works or their staff for that purpose, and from expending any capital raised since the 21st of May, 1885, for such purposes.

The Defendant company put in a statement of defence denying that they had used unauthorized capital for the purpose of manufacturing and supplying tram-car rolling-stock.

The Plaintiffs took out a summons that the Defendants might

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be ordered to make a full and sufficient affidavit as to the documents in their possession or power relating to the matters in question in the action, and produce such documents for inspection by the Plaintiffs' solicitors. And that the Plaintiffs might be at liberty to administer interrogatories for the Defendants to answer.

The summons was dismissed in Chambers so far as it related to inspection, and stood over so far as it related to interrogatories.

A motion was now made on behalf of the Plaintiffs, that the order made in Chambers might be rescinded, and the Defendant company ordered by their proper officer to make an affidavit of documents, and produce such documents for inspection by the Plaintiffs' solicitors.

A suggestion was made that the traffic manager of the Defendant company was the proper person to give discovery.

Grosvenor Woods, for the motion:—

A full discovery of documents will be required unless the person seeking to avoid discovery shews good cause to the contrary. Discovery of documents will be ordered on a mere case of suspicion: *Lyell* v. *Kennedy* (1); *Ind, Coope & Co.* v. *Emmerson* (2); *Sachs* v. *Speilman* (3); *Leitch* v. *Abbott* (4).

If the Court is of an opinion that it would be more reasonable that discovery should be given by means of interrogatories, I ask for leave on the part of the Plaintiffs to exhibit interrogatories.

Rowden and *F. Richardson*, for the Defendants:—

The power of the Court under the present Rules to require an affidavit of documents to be made is discretionary in terms. To allow the discovery now asked would be giving traders an opportunity of ransacking the affairs of their rival. It is not necessary. The application is a mere fishing application, and would not have been allowed even under the old practice: *Great Western Colliery Company* v. *Tucker* (5).

Grosvenor Woods, in reply.

(1) 8 App. Cas. 217, 226.
(2) 12 App. Cas. 300.
(3) 37 Ch. D. 295.
(4) 31 Ch. D. 374.
(5) Law Rep. 9 Ch. 376.

NORTH, J.:—

The case stands thus: The Defendant company are a company authorized to construct and to work tramways. But there is a clause in their Act to this effect. [His Lordship stated the effect of sect. 40 of the *North Metropolitan Tramways Act*, 1885, and referred to the Acts of 1887 and 1890, and proceeded:—]

The Defendant company have recently made ten carriages for another tramway company, and this information is filed by the Attorney-General having as relators apparently about all the companies in *England* carrying on the trade of manufacturing tramway cars and stock, for the purpose of stopping the Defendant company from doing what the Act authorizes them to do, upon the ground that they are doing it out of capital which was not raised for the purpose of the section, and, therefore, which they had not authority to apply for the purpose of carrying on that trade or business. That is denied by the Defendant company. But the Attorney-General, acting for these companies, asks for a general inspection of all the Defendants' books relating to the matters in question in the action, including all their books relating to the traffic they have carried on, and the stock they have manufactured and sold; in short, what is asked for is full information from the Defendant company, carrying on a trade in competition with others—full information to their rivals in trade—of how they are carrying on this business. In my opinion, they are not entitled to anything of the sort; but I do think that they are entitled to some information upon the point raised by their statement of claim. I think the order refusing a general affidavit of documents was perfectly right; but I do think they are entitled to something I was not asked in Chambers to give them, though the summons does mention interrogatories. I think they are entitled to some information as to the capital or moneys which have been applied for the purpose of carrying on the business. I put that very generally indeed, because I have not had indicated at this moment precisely the form or extent to which interrogatories may go; but I do think they are entitled to some information in answer to interrogatories upon this point. They have made a *primâ facie* case, but it is not a very strong one; on the other hand, I do not think that the information is demurrable.

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I think, therefore, they are entitled to some information, but only of a very limited character, and one must be very careful not to give any information to the Plaintiffs which is not necessary for the purpose of enabling them to prosecute their own case, when it may be most unfavourable to the Defendants for general purposes that their rivals in trade should have that information.

Under these circumstances, I do not think it is a case, at present at any rate, for making any order for an affidavit of documents. I am prepared to give the Plaintiffs leave to administer interrogatories to the Defendants, and I would rather hear from Mr. *Grosvenor Woods* the general outline of the interrogatories desired than lay down any line for them myself at present. Then, as regards the person from whom the information is to be obtained, *primâ facie* the secretary is the best person; but I quite admit that they are entitled to have information from such persons as can best give it with respect to the matters which are the proper subject for the interrogatories, though I am not prepared at present to decide who should answer them; except that, as at present advised, I do not think the traffic manager would be the proper person for the purpose.

Solicitors for Plaintiffs: *Hargrove & Co.*
Solicitor for Defendants: *H. C. Godfray.*

D. P.

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May 4, 5.

[1891 F. 4.]

Joint Stock Company—Debenture-holders—Postponement of Charge to Subsequent Mortgage—Power of Majority to bind Minority.

A company issued debentures, each of which, under the provisions therein, or in the debenture-holders' covering deed contained, constituted a first charge upon the undertaking and property of the company, and was held upon the condition that a general meeting of the debenture-holders should have the power, by extraordinary general resolution passed by a certain majority, "to sanction any modification or compromise of the rights of the debenture-holders, against the company or against its property," so as to bind all the debenture-holders, whether present or not.

A meeting of the debenture-holders was afterwards held, at which an extraordinary resolution was duly passed sanctioning a loan to the company of £5000, and resolving that "such loan shall take priority over the existing debentures, and shall be a first charge upon the company's properties." A similar resolution was then passed by the shareholders, and, in pursuance of these resolutions, a mortgage was executed whereby the company charged all its property to secure £5000 advanced by *C.*, and the trustees for the debenture-holders postponed their security in favour of *C.*'s mortgage:—

Held, that the resolution sanctioning the loan, and giving priority to the mortgage by which it was secured, was valid, and the transaction a "modification" of the rights of the debenture-holders within the condition and binding upon a dissentient minority.

THIS was an action by two Plaintiffs, on behalf of themselves and all other the holders of the debentures issued by the *Eddystone Granite Quarries, Limited*, against the Company, Messrs. *Bannerman* and *Dodsworth*, the trustees of the debenture-holders' covering deed, and Mr. *L. G. Campbell*, who had, since the issue of the debentures, taken from the company a charge upon its undertaking purporting to have priority over the debentures. The Plaintiffs disputed the validity of Mr. *Campbell's* security, and claimed a declaration that, notwithstanding that security, the debentures of the company constituted a first charge upon all the undertaking and property of the company. They also claimed an order that the trusts of the debenture-holders' deed might be carried into execution under the direction of the Court.

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The debentures in question were in the usual form of covenants by the company to pay the amount of the advance mentioned in the debenture, with interest, and of charges of such payments upon the company's undertaking, and all its property, wheresoever and whatsoever, subject, nevertheless, to certain conditions indorsed on such debenture. The material conditions were, that the debentures were all to rank, *pari passu*, as a first charge upon the undertaking and property of the company; that the holders of the debentures should be entitled to the benefit of, and subject to the provisions contained in, a covering deed dated the 19th of September, 1889; and that the trustees of the company might at any time call a meeting of the debenture-holders by notice, which notice need not specify the nature of the business to be transacted at the meeting convened. There was no express provision prohibiting the company from creating any other charge to take priority over the debentures.

The covering deed, which was dated the 19th of September, 1889, was made between the Company, of the one part, and the Defendants, *Bannerman* and *Dodsworth*, of the other part, and by it all the undertaking and property of the company, were conveyed and assigned unto *Bannerman* and *Dodsworth*, as trustees for the debenture-holders, upon trust to permit the company to hold and enjoy the same, and to carry on business until the security thereby constituted should become enforceable; and thereafter, upon certain trusts to enter and sell. Among the events, on the happening of any one of which such security was to become enforceable, were the following:—

(*a.*) If default were made in the payment of any interest on the debentures for a period of three calendar months after such interest became payable.

(*b.*) If a resolution of the company were passed for a winding-up.

(*c.*) If the company committed a breach of any covenant in the said indenture contained.

One of such covenants was, that the principal moneys and interest intended to be secured by the debentures should be a first charge on the mortgaged premises, and that the company

would duly perform and observe the obligations imposed upon it by the indenture.

The 4th schedule to the deed contained the following provisions as to meetings of the debenture-holders and the proceedings thereat:—

"14. A general meeting of the debenture-holders, in addition to the power hereinbefore given, shall have the following powers, exercisable by extraordinary resolution, viz.:—

"(1.) Power to sanction the release of any mortgaged premises.

"(2.) Power to sanction any modification or compromise of the rights of the debenture-holders against the company, or against its property, whether such rights shall arise under the debentures or under these presents, or otherwise.

"(3.) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the company.

"15. An extraordinary resolution passed at a general meeting of the debenture-holders, duly convened and held in accordance with these presents, shall be binding on all the debenture-holders, whether present or not present at such meeting, and each of the debenture-holders shall be bound to give effect thereto accordingly.

"16. The expression, 'extraordinary resolution,' where used in the schedule, means a resolution passed at a meeting of the debenture-holders, duly convened and held in accordance with the provisions herein contained, by a majority consisting of not less than three-fourths of the persons voting thereat."

The debentures in question were issued in November, 1889.

The company afterwards became straitened for funds, and wanted a temporary loan to enable them to carry out a heavy contract. The trustees of the covering deed, who were the trustees of the company, called a meeting of the debenture-holders, which was held on the 16th of September, 1890. At that meeting, amongst other resolutions, an extraordinary resolution was duly passed by the debenture-holders, "that the

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debenture-holders sanction a loan to the company of £5000 to pay for plant amounting to about £3000, and to carry them on until something definite has been settled, and that such loan shall take priority over the existing debentures, and shall be a first charge upon the company's properties; and that the trustees for the debenture-holders be hereby authorized to execute such documents as may be necessary to give effect to the same." A meeting of the shareholders was held very shortly afterwards at which an extraordinary general resolution was duly passed, that a temporary loan should be negotiated, and that in accordance with the resolution passed by the debenture-holders, it should be made a first charge upon all the company's properties, and should take precedence of the existing debenture loan. Under the authority of these resolutions a mortgage deed, dated the 2nd of October, 1890, was executed, whereby the company, with the concurrence of the trustees, who executed the deed, in consideration of £5000 advanced by Mr. *Campbell*, made a charge to that amount in his favour as a first charge upon all the undertaking and property of the company, and the trustees, at the company's request, postponed the security given to the debenture-holders in favour of the mortgage thereby effected to Mr. *Campbell*.

On the 1st of December, 1890, an instalment of interest on the debentures fell due, and it was paid to one of the Plaintiffs, but not to the other. Resolutions to wind up the company were passed, but were never confirmed; and on the 1st of January, 1891, this action was brought for the declaration and order mentioned above, by the Plaintiffs, who it was stated were the only two debenture-holders who dissented from the resolution of the 16th of September, 1890.

Hastings, Q.C., and *Ashton Cross*, for the Plaintiffs:—

The resolution of the 16th of September, 1890, which purported to give priority to the projected loan, was *ultrà vires*, and Mr. *Campbell's* security which was founded upon it is invalid. A power to sanction the release of mortgaged premises, or to sanction a modification or compromise of the rights of debenture-holders, will be strictly construed by the Court, and does not empower

a majority to make presents of or take away the property or securities of a dissentient minority, or to sanction a compromise where there is no dispute and the debtor is able to pay: *Hay* v. *Swedish and Norwegian Railway Company* (1); *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (2); *Re Dominion of Canada Freehold Estate and Timber Company* (3). We are, therefore, entitled to the declarations we ask. But in any case we are entitled to an order that the trusts of the debenture-holders' deed shall be carried into execution under the direction of the Court. The company have made default in the payment of interest; they have passed resolutions for a winding-up; they have committed a breach of the covenant contained in the deed, and the trustees of the deed have committed a breach of trust.

Buckley, Q.C., and *Grosvenor Woods*, for the Defendant company:—

By clause 14 of the covering deed a majority of the debenture-holders had power by extraordinary general resolution to "sanction any modification" or compromise of the rights of the debenture-holders, and to do so, so as to bind all the debenture-holders whether present or absent. The resolution of the 16th of September, 1890, was "a modification" of the rights of the debenture-holders within the meaning of this clause. It was not a taking, or giving away, or extinguishment of such rights, nor was it inconsistent with the rights of the minority. Mr. *Campbell's* security was given in order to secure an advance made for the purpose of supplying the company with further capital sufficient to carry out their contracts, and to put the undertaking in working order; and thus incidentally to improve the debenture-holders' security: *Re Dominion of Canada Freehold Estate and Timber Company*; *Carden* v. *Albert Palace Company* (4). Moreover, the Plaintiffs had no right to bring the present action. They are the only dissentients, and the litigation is opposed to the wishes of all the other debenture-holders and shareholders. No resolution for winding up the company has ever been

(1) 5 Times L. R. 460.
(2) 7 Times L. R. 616.
(3) 55 L. T. (N.S.) 347.
(4) Palm. Co. Prec. 5th Ed. p. 635.

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confirmed or become operative: *Dawes' Case* (1); and interest has not been in arrear for the period of three calendar months specified in the covering deed.

Beale, Q.C., and *Warrington*, for the Trustees.

Hastings, in reply, referred to *Brunton* v. *Electrical Engineering Corporation* (2); *English and Scottish Investment Corporation* v. *Branston* (3).

STIRLING, J. (stated the facts, and continued):—

The first and main question raised by the Plaintiffs is the validity of *Campbell's* mortgage. This depends upon the validity of the resolution passed by the debenture-holders on the 16th of September, 1890. That again depends upon the construction of clause 14 of Sched. 4 to the debenture-holders' covering deed. The question in the action, so far as this point is concerned, is whether the debenture-holders had power by passing extraordinary resolutions against the will of a dissentient minority to place *Campbell's* mortgage in front of the charge in favour of the debenture-holders. This question as to the power of debenture-holders' meetings to bind a dissentient minority is not altogether a new one. I have been referred to various cases in which it has arisen under somewhat similar circumstances. I shall refer first to two which have been cited on behalf of the Plaintiffs in support of the contention that the resolution which was actually passed by the debenture-holders was beyond their powers. Both are decisions of the Court of Appeal, and are binding on me. In *Hay* v. *Swedish and Norwegian Railway Company* (4) the debenture-holders' deed contained a clause (No. 16) which differs from the clause in the present case. That clause in effect provided that a resolution of a meeting of the holders of debenture stock which should be carried by a specified majority "shall bind all the holders of the debenture stock as effectually as if all such holders were competent to consent, and had consented thereto in writing for valuable consideration."

Under the trust deed a certain fund had been vested in trustees,

(1) Law Rep. 6 Eq. 232.
(2) [1892] 1 Ch. 434.
(3) 36 Sol. J. 445.
(4) 5 Times L. R. 460.

and set apart for the payment to the debenture-holders of interest upon their debentures.

The company fell into difficulties, and it was extremely desirable to raise money for payments which were urgently required. An application was made by the debenture-holders in an action for administration of the trusts of the deed that leave might be given to call a meeting of debenture-holders to pass resolutions sanctioning the application of that fund for the purpose of making these payments. That came before me in chambers, and I thought that such resolutions, even if passed, would not be effectual for the purpose, and I made no order. The case went to the Court of Appeal where it was fully argued, and Lord *Esher* said that the question was hypothetical, but as the case was one of extreme emergency, the Court would deal with it. His Lordship in his judgment said (1): "The hypothetical point was that, assuming that a meeting of the debenture-holders could be called and that the Court could make an order for the calling of the meeting, would clause 16 of the conditions empower the majority to pass a suggested resolution binding the minority? That question depended upon the construction of the trust deed and the conditions under which the debentures were issued, and whether clause 16 was intended to apply to such a resolution as it was suggested should be passed at the meeting;" and, again, "Did clause 16 contemplate the power of passing a resolution which, if passed, would be inconsistent with the rights given to the debenture-holders under the body of the trust deed? It was not denied that the suggested resolution would, if passed, be inconsistent with those rights. If passed, each debenture-holder would have part of his interest postponed, and that would be a direct contradiction of the clear rights which he had under the trust deed. His Lordship did not think it really necessary to express any opinion as to what kind of resolution could be passed under clause 16. Whether it would be one as to mere administration he need not now decide, although he should be inclined to say that it must be a resolution relating to something not provided for by the trust deed. Anything which was not inconsistent with the trust deed might possibly be passed. But there

(1) 5 Times L. R. 461.

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must be a limit placed upon the wide words of clause 16. The clause did not contemplate that a majority should pass anything which was inconsistent with the rights given by the trust deed to the minority," and the appeal was dismissed.

Therefore the decision turned on the language of the clause there in question which did not specify the particular matters which were to be dealt with by the debenture-holders in extraordinary resolutions; and, that being so, the opinion of the Court of Appeal appears to have been that the majority could not pass anything inconsistent with the rights given by the trust deed to the minority. In the present case, the powers given to general meetings of the debenture-holders are defined to a certain extent. Amongst other things there is power to sanction a modification or compromise of the rights of the debenture-holders against the company or against its property, so that, in terms, the deed does authorize the debenture-holders to do something which they could not have done under the clause in *Hay* v. *Swedish and Norwegian Railway Company* (1). It authorizes the meeting to pass a resolution which is, to the extent of the modification, inconsistent with the rights of the minority of the debenture-holders. Therefore I think that case, though valuable as a guide, is not conclusive on the question I have to decide.

The next case is the *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (2). There clause 22 of the covering deed provided that a meeting of the debenture-holders should have the following powers exerciseable by special resolution (2.) "power to sanction the release of any of the mortgaged premises," and (3.) "power to sanction any modification or compromise of the rights of debenture-holders against the company or against its property, whether such rights shall arise under the debentures or under these presents," words which are very similar to those in the present deed; therefore it is necessary to consider carefully the decision of the Court. The resolution there was "That all rights of the debenture-holders of the *International Company of Mexico*, whether against its property or against the company, be compromised by the acceptance in lieu of such debentures and the coupons accrued and not due,

(1) 5 Times L. R. 460. (2) 7 Times L. R. 616.

and in discharge of such rights, fully paid 6 per cent. Cumulative Preference Shares (entitled to dividend as from the 1st of July, 1889), in the *Mexican Land and Colonization Company, Limited*," and so on. That is to say, the rights of the debenture-holders were to be extinguished by the acceptance of shares in a different company. The Court of Appeal held that that could not be done.

Lord Justice *Lindley* said (1): "Powers given to majorities to bind minorities are always liable to abuse, and whilst full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to stretch them and make them applicable to cases not included in those which they were apparently intended to meet. To take the language of the clause, the power to release the mortgaged premises does not include a power to release the defendant company; the power to modify the rights of the debenture-holders against the company does not include a power to extinguish all their rights; the power to compromise their rights pre-supposes some dispute about them, or difficulty in enforcing them, and does not include a power to exchange their debentures for shares in another company where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money includes a power to accept less than 20*s*. in the pound if the debt is undisputed and the debtor can pay; a power to compromise does not include a power to make presents." Here, again, the question to be decided by the Court of Appeal differs from the one I have to decide; but I fully assent to, and consider myself bound by what was laid down by Lord Justice *Lindley* in the portion of his judgment to which I have just referred. What is proposed to be done here is not to extinguish the rights of the debenture-holders at all; but what has been done is to create a mortgage having priority over the charge contained in the debenture-holders' deed which expressly stipulates that the debentures should be the first charge on the property and undertaking of the company. And the question is, whether such a resolution falls within the power to sanction any modification of the rights of the debenture-holders against the

(1) 7 Times L. R. 618.

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company. Now on this question there is no express decision, but I have the guidance of the judgment of Mr. Justice *Chitty* in *Re Dominion of Canada Freehold Estate and Timber Company* (1). That case came before the Court in a different form from the present, *i.e.*, upon the application of the company for the sanction of the Court to a scheme under the *Joint Stock Companies Arrangement Act*, 1870. Debentures had been issued which did not in themselves create any charge upon the property or undertaking of the company, but were secured by a trust deed which created an effectual security upon that property. The deed contained powers to call meetings of the debenture-holders, and the meetings were to have power, according to the words quoted by the learned Judge in the course of his judgment (for the precise terms of the deed are not stated in the report), to "assent to any modification" of its provisions. The company fell into difficulties. A meeting of debenture-holders was called, and they passed a resolution, the effect of which was that they agreed to let in persons who were willing to advance money, receiving a rent-charge, which was to stand in priority to the debentures, and a considerable sum was raised in that way. Afterwards a voluntary winding-up was resolved upon, and the scheme came before Mr. Justice *Chitty*, and was opposed by, amongst others, a Mr. *Lee*, who raised the question whether the owners of the rent-charge had priority. Mr. Justice *Chitty* says (2): "That question depends entirely upon a trust deed. Now, the trust deed contains a power, not for the company of course, but for the debenture-holders themselves, to enter into certain resolutions which when made bind the whole of the debenture-holders, if the prescribed majority is obtained, and bind the trustees. The majority required is not less than three-fourths in number and value of the debenture-holders present at the meeting. As the debentures are payable to bearer or holder, no other scheme could be provided for giving notice of any such meeting than that which the deed itself does provide, namely, by advertisement. That was the agreement with the debenture-holders in the deed, that the advertisement should be sufficient. Therefore, I say that there is nothing whatever in the argument that distinct notice was not

(1) 55 L. T. (N.S.) 347. (2) 55 L. T. (N.S.) 351.

sent to each debenture-holder. It was impossible to do it for the reasons which I have mentioned; and, what is quite sufficient for the purposes of this case, the deed itself provides that that should be the mode of giving notice of the meeting. Then a proper advertisement was issued, and what was resolved was to modify the provisions of the deed in a manner which certainly impaired very considerably the security of the debenture-holders. The words of the clause upon which reliance is placed, in answer to Mr. *Lee's* objection, are these: 'And may assent to any modification of the provisions herein contained, and may authorize or empower the trustees to execute and do all such transfers, reconveyances, assurances, acts, and deeds and things as may be necessary to effect or complete in accordance with the requirements of the Canadian law.' The material words are, 'assent to any modification.'" (Here they are "sanction any modification or compromise.") "Now, the modification that was assented to by resolutions carried by the requisite majority was a modification which let in, in priority to the debentures, persons who needed to subscribe their money for which they were to receive the security of the rent-charge. I think that such a resolution was authorized by the deed, because one of the difficulties that there always is in dealing with matters of this kind when the company gets into difficulty, and when more money is required, is to deal with the debenture-holders as a class. That is a difficulty which the Legislature itself felt when it passed the Act of 1870, allowing a majority, and a sufficient majority—that is to say, not a mere absolute majority, but a majority much larger than that—to bind the minority. Then it was known that, before the legislation of 1870, any particular individual could hold out against a scheme, however meritorious and however beneficial it might be, in order that he might get, generally speaking, some special advantage for himself, or because he was a person who did not even take a fair view of the advantages to be gained. It was for the purpose of preventing that obstruction that the Legislature passed the *Joint Stock Companies Arrangement Act*, 1870; and it was, in my judgment, for a similar purpose that the parties to this deed said the prescribed majority might bind the minority, and I think the words are large

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enough. Having regard, also, to the subject-matter and the nature of the questions which are likely to arise, I think that the deed did in fact authorize the debenture-holders themselves, by the required majority, to resolve to postpone their security to a new security to be created for the common benefit of them all." Further on the learned Judge says: "I think that this matter is within the scope of the authority conferred by the trust deed itself, and that all the debenture-holders were bound by the resolution of the majority."

He goes on to say that, apart from his view upon that part of the case, he had come to the same conclusion under the Act of 1870, and that the scheme ought to be sanctioned; but he repeats in a later part of the case the opinion that Mr. *Lee* was bound by the resolution.

There is, therefore, a clear expression of opinion by the learned Judge that under the words "assent to any modification," the majority had power to postpone the security of all the debenture-holders to a proposed new rent-charge notwithstanding the dissent of the minority. It may be said that that is not an authority which binds me, as Mr. Justice *Chitty* only decided that the scheme ought to have the sanction of the Court; and he gives, in addition to his reasons for considering that the resolutions of the debenture-holders were valid, other reasons which are not applicable to the present case; nevertheless it is a clear expression of his opinion on words very similar to those in this deed.

The conclusion I come to is that, in accordance with the reasoning of Mr. Justice *Chitty*, this resolution was valid under the power given to the general meeting to sanction "a modification of the rights of the debenture-holders against the company or against its property." I adopt the reasoning of Mr. Justice *Chitty* in the portion of his judgment which I have read, and I hold that this action cannot be maintained as regards the first portion of the relief sought. It does not seem to me that the view expressed by Mr. Justice *Chitty* in 1886 is inconsistent with the cases in the Court of Appeal to which I have referred, and which were of later date. I may state that I have reason to know that the view adopted by Mr. Justice *Chitty* has been acted upon in Chambers on more than one occasion. Under these circum-

stances the action must be dismissed so far as it asks for a declaration that the debentures constitute a first charge.

Then comes the question, whether any further relief ought to be given. At the time when the writ was issued, I think the security created by the debentures had not become enforceable. Interest was in arrear, but not for the period of three months required by the 3rd clause. However, no interest has since been paid, and there were circumstances in the case which entitled the Plaintiffs to bring an action when they did for the protection of their property. A resolution had been passed for a winding-up. True, it was not confirmed; but the Plaintiffs thought they might be prejudiced, and they were justified in bringing the action. It is admitted that the security has now become enforceable, and I think (the trustees not objecting) that the Plaintiffs ought to have judgment that the trusts of the deed be carried into effect under the direction of the Court, with liberty to apply. That will protect the trustees of the deed. It is obvious that the company is far from being out of its difficulties. I propose to dismiss the action, so far as it seeks the declaration I have mentioned, to direct that the trusts of the deed be administered, and to give liberty to apply. As to the costs, so far as it is an administration action, I do not deal now with them; but it is obvious that the main question which has been raised by the action is that which relates to *Campbell's* security, and I think that so much of the costs of the action as have been caused by that question must be borne by the Plaintiffs. The other costs will be reserved.

Solicitors: *Wood & Wootton; S. T. Biggs; Harwood & Stephenson.*

W. W. K.

STIRLING, J.
1892
May 17, 24.

In re GREY'S TRUSTS.
GREY *v.* STAMFORD.

[1892 G. 237.]

Will—Specific Devise of Real Estate—Children—Legitimacy—Child born out of Wedlock—Legitimation by subsequent Marriage of Parents—Domicil.

The rule laid down in *Doe* v. *Vardill* (1), that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in *England*, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children."

Accordingly, where a testator specifically devised real estate and bequeathed personal estate to trustees upon trust for his son for life, and, after the death of his son, for all his son's "children" in equal shares:—

Held, that a child of the son, born out of wedlock, but legitimated according to the law of the son's domicil, by the subsequent marriage of its parents, was entitled to share with a child born after the marriage in both the realty and personalty.

ADJOURNED SUMMONS.

The Rev. *Harry Grey* by his will, dated the 10th of April, 1847, gave, devised, and bequeathed "All that my messuage, farm, and lands called *Great Heatley Heath Farm*, in the parish of *Lymm*, in the county of *Chester*, with all the rights and appurtenances thereto belonging, subject to and charged nevertheless with a certain mortgage debt of £4000 now secured thereon, together with the interest thereof, if any, which shall be due at the time of my decease, unto my seven children"—by name, including *Harry Grey*—"their heirs and assigns equally to be divided between them as tenants in common."

The testator gave the residue of his real and personal estate to trustees upon trust for sale and conversion, and then upon trust for investment, and to pay and divide all the said trust moneys, stocks, funds, and securities in equal shares between and amongst "all and every my present and future born children and child, who, being a son or sons, shall respectively attain the age of twenty-one years, or, being a daughter or daughters, shall respectively attain that age or be married under that age with

(1) 2 Cl. & F. 571; 7 Cl. & F. 895.

the consent of the trustees for the time being acting in the execution of the trusts of this my will, the same shares to be paid or transferred to or for the benefit of my said sons and daughters respectively at the respective times aforesaid."

By a codicil dated the 5th of September, 1848, the testator directed, that "as to the share of my property bequeathed by my will to my eldest son *Harry*, I vary the bequest thereof as follows: First, I declare that the word share in this codicil shall be understood to mean all real and personal property which my said son may at any time after my decease be entitled to claim or receive under my will. I hereby direct my executors forthwith to transfer the share of my said son *Harry* to the Rev. *T. G. Clerke*, Vicar of *Woodmancote, Hampshire*, and my son *George Grey*, who shall stand possessed of the same upon the following trusts, namely," for investment and to pay the annual produce thereof to his son *Harry* during his life, and after his death, and subject to an annuity to his widow, "in trust for all his children, to be paid to them respectively when and as they shall respectively attain the age of twenty-one years, and to be divided between them in equal shares, the class of children to include those born after my decease as well as those born previously, their shares to vest at the expiration of six months after the decease of my said son."

By a subsequent codicil the testator revoked the gift of an annuity to *Harry Grey's* widow, but did not alter the rest of the first codicil; and the question arising in this case was, who were to be considered "children" of *Harry Grey*, having regard to the fact that part of his share consisted of a specific devise of real estate. The testator died on the 26th of March, 1860.

Harry Grey went to the *Cape of Good Hope* in 1855, and resided there until the time of his death, having, as his Lordship held on another branch of the case which does not call for a report, acquired a domicil in that country. In 1880 he married a woman by whom he had previously had a son, *John Grey*, born in 1877. Subsequently to the marriage he had a daughter by his wife. In 1883 he succeeded to the Earldom of *Stamford*, and he died on the 19th of June, 1890. This was an originating summons taken out by the daughter, Lady *Mary Grey*, by her

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next friend, for the purpose of determining her rights and interests under the will and codicils of the testator. By the marriage of his parents *John Grey* was, according to the Roman-Dutch law of the *Cape*, legitimated, and one of the questions arising upon the summons was whether he ought to be included in the class of "children" so as to entitle him to share, with the daughter born in wedlock, in the gift of real and personal estate to the children of *Harry Grey*.

Buckley, Q.C., and *A. Young*, for Lady *Mary Grey*:—

The question is, What is meant by the "children" of *Harry Grey*? We submit that it means legitimate children; but legitimate according to what law? The word "children" in the will must be read as meaning "children legitimate according to the law of *England*." That being so, *John Grey* is not entitled to a share of the real estate. *Harry Grey* having acquired a domicil at the *Cape*, by the law of that Colony *John* became legitimated by the subsequent marriage of his parents, and it may be that he would be entitled to a share of the personalty: *Boyes* v. *Bedale* (1); *Goodman's Trusts* (2); *In re Andros* (3). But in the case of real estate it is different. No one can inherit land in *England* who is not heir-at-law according to the law of *England*: *Doe* v. *Vardill* (4). That case refers to the inheritance of land on an intestacy; but it applies equally to the present case of land specifically devised. No doubt as to the personalty the authorities are against us; but here the question is one of construction. If we are right in reading the will as if it contained a provision that the real estate should go to the "children legitimate according to the law of *England*," then a different construction cannot be adopted for the purpose of determining the succession to the personal estate. When once the words have been read into the will for the purpose of determining the succession to the real estate, they must be allowed to stand for all purposes. Under those circumstances, Lady *Mary Grey* is entitled to both real estate and personal estate to the exclusion of *John Grey*.

(1) 1 H. & M. 798.
(2) 17 Ch. D. 266.
(3) 24 Ch. D. 637.
(4) 5 B. & C. 438; 7 Cl. & F. 895.

Hastings, Q.C., and *Rolt*, for *John Grey*:—

The question is covered by the decision in *In re Andros* (1). That no doubt related to personalty only; but the same principle applies to a devise of real estate: *Doe* v. *Vardill* (2) is confined to the case of descent upon intestacy: *Skottowe* v. *Young* (3). The law is clearly stated by Mr. Justice *Kay* in *In re Andros* (4), and that statement applies here, and the mere fact that there is some real estate cannot alter the construction of the will having regard to the meaning of the word "children." In the case of personalty, the Court will have regard to the law of the domicil in order to ascertain the class of children entitled to take, and the fact that there is also some real estate cannot operate to cut down the class so ascertained.

Buckley, in reply:—

No difficulty is created by the fact of the rule of law in the case of realty being different from that which is applicable in the case of personalty.

Monnington, for the trustees.

F. Mackarness, for the executors of Lord *Stamford's* will.

1892. May 24. Stirling, J. (referred to the will and codicil, and continued):—

The question arises on the meaning of the word "children" in the codicil. I have held that *Harry Grey* (therein named), afterwards Earl of *Stamford*, became domiciled at the *Cape of Good Hope*. By a lady whom he married there he had a son born before marriage, and the question is whether that son is to be included in the class of "children," the evidence being that by the law of the *Cape of Good Hope* he was legitimated by the subsequent marriage of his parents. The question has been considered in several cases of late years, but I need only refer to *In re Andros*. [His Lordship read the head-note to that case, and proceeded:] Mr. Justice *Kay* went through all the

(1) 24 Ch. D. 637.
(2) 5 B. & C. 438; 7 Cl. & F. 895.
(3) Law Rep. 11 Eq. 474.
(4) 24 Ch. D. 637, 642.

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authorities, and that renders an examination of them by me unnecessary. The *ratio decidendi* appears from the following passage (1): "A bequest in an English will to the children of *A.* means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined. That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended *A.*'s legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?" Then after considering the authorities, he says (2): "The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil. Thus *ante nati* whose father was domiciled in *Guernsey* at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of *Guernsey*, are recognised as legitimate by the law of this country, and can take under such a gift."

That case lays down the rule with regard to a gift of personalty. In *Skottowe* v. *Young* (3) the Vice-Chancellor (Sir *John Stuart*) dealt with a gift of land in *England*, devised upon trust to sell and apply the proceeds as personalty, and the same rule was applied by him to that gift as was adopted by Mr. Justice *Kay* in *In re Andros* (4). *Skottowe* v. *Young* is recognised by the Court of Appeal as an authority in *In re Goodman's Trusts* (5); therefore, so far as the present case refers to a bequest of personalty, or to

(1) 21 Ch. D. 639.
(2) Ibid. 642.
(3) Law Rep. 11 Eq. 474.
(4) 24 Ch. D. 637.
(5) 17 Ch. D. 266.

a devise of land upon trust for sale, it is covered by authority. There remains the case of a specific devise of real estate. As to that, there is no authority in point, and I have taken time to examine more carefully the case of *Doe* v. *Vardill* (1) to see if there is anything in that case which prevents one from following the decision in *In re Andros* (2), and I have satisfied myself that there is nothing. Referring to *Doe* v. *Vardill*, *James*, L.J., in *In re Goodman's Trusts*, says (3): "In that case we have the careful and elaborate judgment of the Judges summoned to advise the House of Lords. And in that judgment, or advice, there are two distinct propositions clearly and distinctly enunciated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. The first proposition was accepted by the law lords without any doubt or question; the second was questioned. After further reference to the Judges and further hearing, the case was at last determined in accordance with the second proposition. But the first proposition has never been really questioned." Now it seems to me, upon examination of *Doe* v. *Vardill*, that the rule there laid down relates only to the case of descent of land upon an intestacy, and does not affect the case of a devise in a will to children. In my opinion, therefore, the son, *John Grey*, is entitled to share in both the real and personal estate.

Solicitors: *Flux, Son & Co.; Gamlen & Burdett.*

(1) 2 Cl. & F. 571; 7 Cl. & F. 895. (2) 24 Ch. D. 637.
(3) 17 Ch. D. 298.

G. A. S.

STIRLING, J.
1892
May 6, 21, 24.

In re HOARE.
HOARE *v.* OWEN.

[1889 H. 1950.]

Mortgage of Shares—Creditor's Action to administer Mortgagor's Estate—Receiver—Back Rents and Profits of Security in hands of Receiver—In custodiâ legis—Right of Mortgagee as against Receiver.

Money in the hands of a receiver is not *in custodiâ legis* in the same way as if it were in the hands of a sequestrator.

In June, 1886, *H.* borrowed from *R.* the sum of £7000 on the security of a transfer of shares in a company. *R.* took no steps to have himself registered as owner of the shares until 1892. *H.* died in 1889, having paid interest on the mortgage debt down to April, 1888. In June, 1889, in a creditor's action to administer *H.'s* estate, a receiver was appointed. In July, 1889, the company issued to the receiver debentures representing arrears of dividends upon the shares accrued prior to *H.'s* death. In 1892 *R.* valued his security at £1000, and proved for the balance of his debt. He was afterwards registered by the company as transferee of the shares, and then claimed to have the debentures handed over to him by the receiver:—

Held, that he was not so entitled, the debentures not being *in custodiâ legis* for his benefit, but being assets in the hands of the receiver, who for this purpose was in the same position as an executor.

Delany v. Mansfield (1) not followed.

MOTION.

On the 30th of June, 1886, Captain *Charles Hoare* borrowed from Mr. *A. C. de Rothschild* £7000 on the security of 10,000 8 per cent. preference shares of £1 each (fully paid) in the *United Horse Shoe and Nail Company, Limited*, and deposited with him a transfer of these shares. The transfer was presented to the company, who certified that certificates representing the shares had been lodged at the office; but Mr. *de Rothschild* took no steps to have himself registered by the company as transferee of the shares until the 11th of March, 1892, when such registration was effected. Captain *Hoare* paid interest on the loan down to April, 1888. He died on the 10th of May, 1889, leaving heavy liabilities and a small estate. Shortly after his death this action

(1) 1 Hog. 234.

was instituted by creditors for the administration of his estate; and on the 7th of June, 1889, an administration order was made and a receiver appointed.

The company paid no dividends on the shares in 1888; but on the 26th of July, 1889, they issued to the receiver two second mortgage debenture bonds for £335 17*s.* 5*d.* and £353 13*s.* 11*d.* respectively in respect of arrears of dividends on these shares and on others held by Captain *Hoare*, such dividends having accrued due prior to his death.

On the 3rd of February, 1892, Mr. *de Rothschild* valued the shares at £1000, and proved for £6000, the balance of the debt, waiving all claim to interest under the impression, as was alleged, that the shares had been unproductive since 1887.

On the 17th of February, 1892, the company paid to the receiver a sum of £40 17*s.* 11*d.* in respect of interest upon the second mortgage debenture bonds.

On the 23rd of March, 1892, the receiver took out a summons for directions with reference to further dividends upon the shares, and upon this summons Mr. *de Rothschild* appeared, and claimed to have so many of the debenture bonds as represented interest upon his shares delivered to him, and also to have paid to him a proportional part of the £40 17*s.* 11*d.*

The summons was heard in Chambers on the 11th of April, 1892, when the claim of Mr. *de Rothschild* was disallowed. He now moved that the order in so far as it dismissed his claim might be discharged.

Maidlow, for Mr. *de Rothschild*:—

These bonds represent back rents and profits of the security, and, being in the hands of the receiver, they are *in custodiâ legis* for the benefit of the Applicant. The receiver is not the agent of the mortgagor; receipt by him therefore is not receipt by the mortgagor, and as mortgagee in possession I am entitled to all proceeds of the security which have not reached the mortgagor's hands: *Walker* v. *Bell* (1); *Tatham* v. *Parker* (2); *Delany* v. *Mansfield* (3).

(1) 2 Madd. 21. (2) 1 Sm. & Giff. 506.
(3) 1 Hog. 234.

STIRLING, J.

1892

In re HOARE.

HOARE v. OWEN.

Hastings, Q.C., and *McLaren*, for the receiver:—

Where a mortgagee is prevented from taking possession by the Court it takes care no doubt that he shall not be injured; but a mortgagee who has not taken possession has never been held entitled to rents in the hands of a receiver in an action to which he is not a party. Here the mortgagee did not try to take possession at all until 1892. He valued his security at £1000, and claimed the difference. His security was, therefore, at an end, and he cannot claim these back rents and profits. The authorities cited do not govern this case. Except the Irish case of *Delany* v. *Mansfield* (1), they all relate to money in the hands of sequestrators.

[STIRLING, J.:—In *Walker* v. *Bell* (2) a year had elapsed before the mortgagee made any application, yet the Court made an order that he should have the rents since the appointment of the receiver.]

That was an application by the mortgagees themselves to be let into possession and to have the rents received *in medio* paid over to them. This is not a claim to enter into possession; but, being now in possession, the mortgagee claims something in the hands of the receiver to which we submit he cannot make out any title.

[STIRLING, J.:—*Delany* v. *Mansfield* seems to be in point.]

There also the plaintiff was coming to take possession. That is the distinction.

A mortgagee who is out of possession cannot claim back rents: *Thomas* v. *Brigstocke* (3); *Ex parte Wilson* (4); *Flight* v. *Camac* (5).

Maidlow, in reply:—

Thomas v. *Brigstocke* serves as an illustration of this case, because there the receiver was in possession for the persons claiming under the will of the mortgagor. It is clear that the mortgagee cannot get rents which have come to the hands of

(1) 1 Hog. 234.
(2) 2 Madd. 21.
(3) 4 Russ. 64.
(4) 2 V. & B. 252.
(5) 25 L. J. (Ch.) 654.

the mortgagor; but here the debenture bonds are in the hands of the receiver, and therefore still *in custodiâ legis*. *Delany* v. *Mansfield* (1) is distinctly in point.

[STIRLING, J.:—But is it consistent with *Thomas* v. *Brigstocke*? (2).]

I submit that it is, the point being that the receiver is not the agent of the mortgagor: *In re Brown* (3); *Warren* v. *Warren* (4); *Fisher* on Mortgages (5).

H. C. Hull, for the Defendants, the executors.

May 21. STIRLING, J.:—

This is a motion to discharge an order made in Chambers which raises the question who is entitled to certain debentures which have been issued in respect of the dividends on certain shares in a company called the *United Horse Shoe and Nail Company, Limited*, which stood in the name of Captain *Hoare* at the time of his death. On the 30th of June, 1886, Captain *Hoare* created an equitable security on the shares in question, the precise nature of which I do not know, but it appears to have consisted partly of a transfer to the mortgagee, which transfer the mortgagee did not see fit to have registered. On the 10th of May, 1889, the testator died. He had paid interest on the security down to April, 1888. Shortly after his death the present action was commenced. It is an action by a creditor on behalf of himself and all other the creditors of the testator for the administration of his estate, and in this action, on the 7th of June, 1889, an order was made appointing a receiver. On the 26th of July, 1889, certain debentures were issued by the company to the receiver of the nominal value of 689*l.* 11*s.* 4*d.*, representing a dividend of 5¾ per cent. upon the mortgaged shares and on other shares held by the testator for the year 1888, the period during which such interest accrued being prior to the death of the testator. The mortgagee took no steps in the action till February, 1892, when he came in and

(1) 1 Hog. 234.
(2) 4 Russ. 64.
(3) 32 Ch. D. 597.
(4) 13 Ir. Eq. Rep. 69.
(5) 3rd Ed. vol. i. p. 414; 4th Ed. p. 383.

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In re HOARE. HOARE v. OWEN.

valued his security and proved for the balance. Subsequently, in March, he was registered as transferee of the mortgaged shares. The question was raised in Chambers on an application for directions as to who was entitled to the debentures representing the interest on the shares. It was held that the contention of the mortgagee that he was entitled to them was not well founded, and that they formed part of the general estate of the testator, and an order was made accordingly. A motion is now made to discharge that order. The first argument is this, that the debentures being in the hands of the receiver are *in custodiâ legis*, and ought to be handed over to the mortgagee. In support of that contention three cases were cited: *Walker* v. *Bell* (1), *Tatham* v. *Parker* (2), and *Delany* v. *Mansfield* (3). The first two cases relate to property in the hands, not of a receiver, but of a sequestrator, and the cases in question and the authorities referred to in them establish the proposition contended for so far as sequestrators are concerned, and if the property here had been in the hands of a sequestrator I should have had to follow them. But receivers are not in the same position at law as sequestrators, and the question is whether I must apply the same rule to them. In support of the contention that I should do so, *Delany* v. *Mansfield* was relied on. In that case there were two causes, and a motion was made for the plaintiff in the first cause that a consent signed by the defendant might be made a rule of Court in both causes; the consent was that the receiver, who had been lately extended to the second cause, might pay a sum of money which was previously in his hands to the plaintiff in the first cause. The bill in the first cause was filed in 1822 for the purpose of raising the arrears of an annuity, and there was a receiver on process in May, 1823. The plaintiff in the second cause, though a prior incumbrancer, was not made a party to the first cause. The bill in the second cause was filed in October, 1824, and the receiver was afterwards extended to that cause. He had previously collected three years' rent, and the plaintiff in the first cause rested his present application on the ground that, as these

(1) 2 Madd. 21. (2) 1 Sm. & Giff. 506.
(3) 1 Hog. 234.

rents were collected in consequence of his diligence, the Court would consider them as bygone rents, as against the plaintiff in the second cause. The Master of the Rolls said (1): "I do not consider the right of the plaintiff in the first cause to be such as he now asserts it. This application is inconsistent with the course of business in a Court of Equity, as a receiver in a cause is not appointed for the benefit of a plaintiff merely, but for all other persons who may establish rights in the cause. A receiver cannot be more the agent of the plaintiff than a sequestrator; and *Walker* v. *Bell* (2), is an authority to shew, that rents received by sequestrators are not considered as vested in the plaintiff, but are *in custodiâ legis*; and there must be a further order before they can be applied for the benefit of the defendant; and if other parties come in the meantime, and establish a prior right, they become entitled to them. Any argument which treats rents in the hands of a receiver as if paid to the plaintiff, is quite unfounded, and subversive of the rights of prior creditors, who are not parties to the cause, *to be examined pro interesse suo.* If money as soon as collected by a receiver is to be considered the property of the plaintiff, every inquiry in a decree as to prior incumbrances must be to a great extent useless. If a puisne creditor gets a receiver, a prior creditor may file a bill, and attach the money in his hands."

Delany v. *Mansfield* (3) is not binding on me, being an Irish decision; but, of course, it is deserving of all respect. The decision may be right; but I do not think that the learned Judge intended to lay down that in all cases moneys in the hands of a receiver are to be treated as *in custodiâ legis* in the same way as they would be in the hands of a sequestrator. That would be inconsistent with English cases of high authority, which are binding on me. I shall refer to two or three of those cases. The first is *Bertie* v. *Lord Abingdon* (4), which I do not refer to as being exactly in point, but because the law is there explained with great clearness by the Master of the Rolls, Sir *William Grant.* He says (5): "But it is said, that, though the interest be in fact

(1) 1 Hog. 235.
(2) 2 Madd. 21.
(3) 1 Hog. 234.
(4) 3 Mer. 560.
(5) 3 Mer. 567.

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unpaid, the order of the Court, directing the receiver to keep down the interest of the incumbrances, had the effect of an appropriation of the rents and profits to that specific purpose; and that the rights of the parties are, therefore, now the same as if the rents and profits had been so applied. Now, certainly, such a direction is given without the least view to the interests of the real and personal representatives. It is given, partly in justice to the incumbrancers, that they may not be injured by the act of the Court, in taking possession of the rents and profits, to which they had a right to resort for payment of their interest—partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to resort to proceedings injurious to those who stand behind them. The incumbrancers may or may not avail themselves of the order, by applying to the receiver. If they apply to him, they will either be paid their interest, or, if he refuses or neglects to pay them, they may complain to the Court of such neglect or refusal. But if they omit to apply for the interest, it is to be presumed that they are satisfied with the security they have, both for the interest and the principal. The Court does not force payment upon them; nor does it set apart any portion of the rents and profits to answer unclaimed interest. The balance is paid in by the receiver, and carried to the credit of the cause, without any previous inquiry, whether all the incumbrancers have or have not received their interest. If the estate were not in the possession of the Court, one incumbrancer might claim his interest and insist on being regularly paid. Another might suffer his to run in arrear. The estate would be discharged of the one, and remain burdened with the other. Why should it be otherwise when the estate is in the possession of the Court? To benefit the real, at the expense of the personal estate, is no part of the purpose for which the order is made, although it may be a consequence of the incumbrancer's choosing to take the benefit of the direction given to the receiver. Here is a fund, consisting of rents and profits, which had not been applied in the payment of interest in the lifetime of *Willoughby Bertie*, nor appropriated for such payment. What is that fund, then, but the personal estate of *Willoughby Bertie*? and what right has the person taking the real estate under him

to say, that this portion of the personal estate shall, after his death, be applied to the exoneration of the real estate, from the burden of that interest? I conceive there is no ground for such a claim."

In *Gresley* v. *Adderley* (1) this occurred. There was a mortgage of a term of 100 years created for raising a sum of £4000. A suit was instituted for the purpose of raising portions charged on the estates comprised in the term, and appointing guardians and a receiver. By an order made in that cause, it was referred to the Master to appoint a receiver of the rents and profits of (amongst other estates) those comprised in the term. A receiver was appointed, and the rents and profits received by him were paid into Court. An inquiry was ordered to what charges and incumbrances the estate was subject, and what was due in respect of them, and the receiver was directed to keep down the interest on the incumbrances. The term ran out, and the persons entitled to the sum of £4000 filed a bill for an account and payment of the sum due to them as mortgagees, and they moved for liberty to prove for what was due to them, and that the Master might take an account of the rents and profits of the premises comprised in the term which had come to the hands of the receiver from the time of his appointment to the expiration of the term. Lord *Eldon* said this: "The question comes round to this, whether the Court, having appointed a receiver, towards the close of the term of one hundred years, when the mortgagee might, perhaps, have been entitled here, if not at law, to receive the rents, will pay the charge out of the rents so received? That question I will not decide on motion; the parties are at liberty to file a bill. But there is a great difficulty in the way. The order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. The Court would not deprive them of the advantage of their legal estates; they might perhaps be obliged to come here to be examined *pro interesse suo*: but this Court would not interfere against them. But I apprehend that when the Court interposed to receive the rents beyond what was required for keeping down

(1) 1 Swans. 573, 579.

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the interest on incumbrances, all the surplus rent, after payment of interest, was received for the benefit of the heir. I think that the mortgagee of a term, if he chooses not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee, who has suffered the rents to be applied for purposes other than the satisfaction of his security"; and he refused the motion.

In *Thomas* v. *Brigstocke* (1) the mortgagee petitioned to be paid the rents of the mortgaged premises which had accrued due since the 18th of June, 1818, and had been paid into Court by a receiver, who was appointed on the 22nd of May, 1818, in a suit to which the mortgagee was not a party, and which was instituted for the purpose of carrying into execution the trusts of the mortgagor's will. After the appointment of the receiver, the mortgagee, whose title was at that time disputed, had given notice to the tenants of the mortgaged estate to pay their rents to him; but, in consequence of the appointment of a receiver, the notice had been disregarded. In March, 1827, a petition was presented by the mortgagee, praying that the receiver might be discharged; and, on the 6th of August, 1827, an order discharging the receiver was made. The rents in Court had accrued due between the time of the receiver's appointment and the time of his discharge. For the petitioner, the mortgagee, it was argued, that he had entitled himself at law to the rents by his notice to the tenants in June, 1818, and that equity would not permit the appointment of a receiver to deprive the mortgagee of his legal rights.

The Master of the Rolls (Sir *John Leach*) said (2): "A mortgagee is entitled only to such rents as accrue due when he is in possession of the mortgaged premises. His notice to the tenants could not divest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor. For the purpose of divesting the possession of the receiver, an application to the Court was necessary; and it seems that the mortgagee actually made such application a few months since, and obtained an order for the discharge of the receiver. From the time of the discharge of the receiver, or perhaps from the

(1) 4 Russ. 64. (2) 4 Russ. 65.

time when his application was first made for that discharge, he may be considered in possession; but he can have no intermediate rents, when he was out of possession."

From that decision there was an appeal, and the case was argued by Mr. *Sugden*. The argument is reported at considerable length, and everything which could be said in support of the mortgagee's contention was brought before the Court, including the argument from the analogy of a sequestration. The last argument is this: "The possession of the receiver cannot be of more avail against the mortgagee than the possession of a sequestrator would have been; and in *Hamblyn* v. *Ley* (1), sequestrators, who had obtained possession, were ordered to account for the rents and profits to the persons who had obtained a prior conveyance." The report goes on to say that the Lord Chancellor, Lord *Lyndhurst*, dismissed the appeal with costs. No reasons are given, but the view of Sir *John Leach* is thus confirmed.

It seems to me that these decisions are inconsistent with the contention that money in the hands of a receiver is *in custodiâ legis* in the same way as if it were in the hands of a sequestrator. It was then contended that in *Thomas* v. *Brigstocke* (2) it was made out that the receipt by the receiver was on behalf of persons who claimed under the will of the testator, and that the case could be distinguished on that ground. This contention amounts to an abandonment of the first point; but it leads to what, in my opinion, is the true rule, that where money is in the hands of a receiver you must look in each case to all the circumstances, and in particular to the nature of the action and the object of the appointment of the receiver.

Where the object of the action is to ascertain who are the incumbrancers on a particular property and their priorities, or to settle a dispute as to title, it may well be that the receiver holds money coming to his hands on behalf of the person who may prove to be the true owner. Here the action is simply an ordinary creditor's action, in which a receiver has been appointed. The object of the action is to obtain payment of the testator's debts out of his assets. The object of the appointment of a

(1) 3 Swans. 301, n. (2) 4 Russ. 64.

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receiver is to secure that all assets properly applicable for that purpose shall be so applied. In ordinary course, those assets would be received by the executor; but here, for some good reason and for the security of the creditors, the Court has appointed an officer to stand (so far as the receipt of the assets is concerned) in the executor's place. It seems to me that the creditors cannot, as regards the application of the assets thus received, be in a worse position than if the executor had received them. It was admitted (as it could not but be) by counsel for the mortgagee, that if these debentures had come to the hands of the executor the mortgagee would have had no claim. I think, therefore, that the application on his behalf fails. The motion must be refused, with costs.

May 24. *Hastings*, Q.C., drew the attention of the Court to the case of *Morrogh* v. *Hoare* (1), in which *Blackburne*, M.R., took the same view of *Delany* v. *Mansfield* (2) as that above taken by Mr. Justice *Stirling*.

Solicitors: *Dawes & Sons; Trinder & Capron; Keddey R. Fletcher.*

(1) 5 Ir. Eq. Rep. 105. (2) 1 Hog. 234.

G. A. S.

GRIFFITH *v.* HUGHES.

KEKEWICH, J.

[1891 G. 1070.]

1892 May 12.

Breach of Trust—Indemnity—Trustee Act, 1888 (51 & 52 *Vict.* c. 59), s. 6—*Breach of Trust committed "at the instigation or request or with the consent in writing of a Beneficiary"—Request without Writing.*

In sect. 6 of the *Trustee Act,* 1888 (51 & 52 Vict. c. 59), providing for indemnity to a trustee who has committed a breach of trust "at the instigation or request or with the consent in writing of a beneficiary," the words "in writing" apply only to "consent," and not to "instigation" or "request."

The discretion which the section confers upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust.

Where a trustee for a married woman, tenant for life restrained from anticipation, advanced part of the capital to her upon her verbal request and statement that the money was needed to prevent her home from being sold up:—

Held, that the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the income payable to the married woman.

Ricketts v. *Ricketts* (1) distinguished.

ELIZABETH THOMAS, who died on the 26th of March, 1883, by her will, dated the 25th of February, 1880, gave all her real and personal estate to *Hugh Roberts* and the Defendant, *Robert Hughes,* upon trust to convert and invest and pay the resulting income to the Plaintiff *Elizabeth Griffith* during her life without power of anticipation, free from the debts or control of her present or any future husband, and her receipt alone notwithstanding coverture to be a sufficient discharge for the same, and after her death upon certain trusts in favour of her children.

The will contained no appointment of executors. Letters of administration with the will annexed were granted to the Defendant on the 29th of November, 1883.

On the 21st of May, 1891, this action was brought for accounts of the personal estate of the testatrix and of the dealings of the

(1) 64 L. T. (N.S.) 263.

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Defendant therewith, alleging breaches of trust by him, and seeking to have him removed from the trusts of the will.

On the 29th of June, 1891, an order was made directing an account of the personal estate, and an inquiry as to the way in which it had been employed by the Defendant.

It appeared that in or about February, 1884, the Plaintiff had applied to and requested the Defendant to advance to her out of the trust estate the sum of £80, stating that the advance would save her home from being sold up, as she and her husband were being pressed for payment of debts amounting to that sum or thereabouts. The Defendant complied with the request, being, as he alleged, ignorant of the meaning of the words "without power of anticipation" contained in the will, and the Plaintiff, her husband, and his brother (since deceased) signed a promissory note for the sum of £80 in favour of the Defendant.

The Chief Clerk by his certificate, dated the 14th of March, 1892, found that the payment of the £80 was made at the request of the Plaintiff; but it did not appear that there was any document in writing signed by her instigating, requesting, or consenting to the payment.

Upon the action coming on to be heard on further consideration, the question arose whether, upon the Defendant paying the £80 into Court (which he submitted to do), he was entitled to the benefit of the provisions of sect. 6 of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59). That section is as follows:—

"(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

"(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

Renshaw, Q.C., and *H. C. Hawkins*, for the Plaintiff.

Vernon R. Smith (*Warmington*, Q.C., with him), for the Defendant:—

As against the Plaintiff, the married woman, the Defendant is entitled by virtue of sect. 6 of the *Trustee Act*, 1888, to say that the income payable to her must be applied by way of indemnity to him to answer the £80 advanced by him to her in breach of trust at her request.

Renshaw, in reply:—

Assuming the case to be within the section, it is not one in which the Court ought to exercise its discretion in favour of the trustee. In *Ricketts* v. *Ricketts* (1), the only reported decision under the section, Mr. Justice *Romer* declined to exercise the discretion in a case in which the trustee must be taken to have been aware that his act was a breach of trust, and had not been induced to commit it by any misrepresentation or deceit on the part of the beneficiary. That is precisely the case here.

But, further, the case is not within the section at all, because there is no evidence here that there was any request in writing by the beneficiary. Upon the true and grammatical construction of the section the words "in writing" refer to the instigation or request as well as to the consent. There is no reason why those words should be confined to the last of the three antecedents, or why the evidence of a writing should be required in the case of a consent, and not in the case of an instigation or request.

KEKEWICH, J.:—

Sect. 6 of the *Trustee Act*, 1888, gives the Court, in the case of a breach of trust, a discretionary power to impound, as against an instigating, requesting, or consenting beneficiary, the interest of such beneficiary to indemnify the trustee against loss which he otherwise would have to bear by reason of the breach of trust. That is a general account of the section. Whenever the statute is resorted to the Court has to exercise a judicial discretion, and I am told that the only case in which there is a record of an

(1) 64 L. T. (N.S.) 263.

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appeal to that judicial discretion is the case of *Ricketts* v. *Ricketts* (1), in which Mr. Justice *Romer* thought it right not to give the trustee the benefit of the indemnity, and thought so generally upon the ground that he must be taken to have been aware that he was committing a breach of trust. That is the case here. There is no doubt that the trustee must be taken to have been aware, when he paid the money to this married woman, who by the settlement of which he was trustee was restrained from anticipation, that he was doing that which by law he was not entitled to do, and was departing from his duty and exceeding his power. But, on the other hand, he was not the only person who knew that. He says, I should observe, that he was not aware of it, and possibly he was not aware of it in fact, but he was so in the eye of the law. But the other parties to the transaction were the husband and wife, who, if they were not aware of it in fact, were certainly, as much as he was, aware of it in law; and they got a benefit from it which he did not. I think that if a statute gives the Court power under these circumstances to protect a trustee from loss when, without moral dishonesty, he has committed a breach of trust for the benefit of other persons standing on a footing of equality with himself as regards knowledge of the facts which constitute the breach of trust, and who therefore are not in a position to blame him for his conduct—I think, I say, that when the statute enables that to be done if the Court shall think fit, the Court naturally leans towards exercising the power in favour of the trustee. I have no doubt that Mr. Justice *Romer* had facts before him which influenced his discretion, and I do not for a moment venture to suggest that he did not exercise his discretion rightly in the particular case, into the details of which I do not wish to inquire. But here I think the facts not only authorize, but require me to exercise in favour of this trustee the discretion conferred on me by the Act of Parliament.

But then a point is raised which must be apparent to any one who reads the section, and which is of very general interest and importance in cases of this kind. The statute says that that which it authorizes is to be done "where a trustee shall have committed

(1) 64 L. T. (N.S.) 263.

a breach of trust at the instigation or request or with the consent in writing of a beneficiary." It is common ground that there is nothing here in writing. It is equally common ground that the payment was made at the request of the married woman who is the beneficiary. Is that request, which was presumably by parol only, no writing having been proved, sufficient to bring the case within the statute? I have no doubt that the section might be read grammatically "at the instigation in writing or request in writing or with the consent in writing"; that is to say, so as to make the words "in writing" govern or apply to all the three antecedents. But I think that that would be somewhat crabbed language, and I do not think that one can suppose the draftsman intended that; though, no doubt, to repeat the words "in writing" three times over, as I have just done by way of explanation, would be extremely awkward. Mr. *Renshaw* asks why there should be any distinction. It appears to me that good reasons for it may be assigned. For instance, many cases occur in which the consent of a person is required or may be obtained notwithstanding that he is not the person intended to be benefited by that which is proposed to be done, and notwithstanding that he has no immediate or possessory interest in that which is proposed to be dealt with. If, for example, a trustee is applied to to make a particular investment, he may say, "I will do it if you get me as many requests or consents as can be obtained." The request would be by the person who was to be benefited immediately, the recipient of the income or tenant for life; the consent would much more often be that of a person entitled in remainder—perhaps remotely or contingently. Such a person would not in an ordinary way "instigate" or "request," but would, on the other hand, not object to saying that the thing was done with his consent. Experience suggests many cases in which that might be done as regards investments and other acts and dealings which are perhaps not more than technical breaches of trusts, but are things convenient to be done in the administration of the property. Therefore, finding, as I think I do, that there may be good ground for the distinction between a consent which is to be given in writing, and an instigation or request which need not be in writing, and seeing that grammatically

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the section will certainly bear the construction which I think ought to be given to it, I hold that the words "in writing" apply only to consent, and are not applicable to instigation or request. In the present case, therefore, the trustee will have to pay the £80 into Court, but will be entitled to resort by way of indemnity to the income payable to the married beneficiary.

Solicitors for Plaintiff: *W. M. Tayler & Son*, agents for *R. Luck, Llanfairfechan.*

Solicitors for Defendant: *Bloxam, Ellison & Co.*, agents for *Cemlyn Jones & Thomas, Bangor.*

C. C. M. D.

KEKEWICH, J.
1892
May 14.

SNOW *v.* BOYCOTT.

[1891 S. 4666.]

Merger—Intention—Life Estate and Estate pur autre vie—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 4 [*Revised Ed. Statutes, vol. xvii., p.* 77] —"*Merger by Operation of Law only*"—*Surrender.*

Lands (subject in part to legal mortgages in fee) were devised to the use of two successive tenants for life. The first tenant for life being a lady of advanced age, and desirous of relinquishing the management of the lands, by deed conveyed them to the second tenant for life to hold to him, his heirs and assigns, during all the remainder of her life, to the use that she might thenceforth during the remainder of her life receive an annual sum of £400 to be issuing out of the rents and profits, and subject thereto to the use of the second tenant for life, his heirs and assigns, during the remainder of her life. The deed contained a proviso reducing the amount of the rent-charge so long as she continued to reside with him and he provided her with certain conveniences. He having died in her lifetime:—

Held, that sect. 25, sub-sect. 4, of the *Judicature Act*, 1873, applied to the case; and that, having regard to the intention of the parties manifest on the face of the deed, there was no merger of the estate of the first tenant for life in that of the second tenant for life.

UNDER the will of *Thomas Boycott*, who died on the 24th of April, 1856, the *Rudge Hall* estate stood on and previously to the 28th of July, 1885, limited (subject as to the larger part thereof to legal mortgages in fee simple, and as to the whole to a mortgage for a term of 1000 years) to the use of *Emma Boycott*, spinster, and her assigns during her life, with remainder to the

use of her sons successively in tail male, with remainder to the use of *Cathcart Boycott Wight* and his assigns during his life without impeachment of waste, with remainder to the use of his eldest son in tail male, with remainders over.

In 1885 difficulties had arisen in the management of the estate by *Emma Boycott*, who was of advanced years. In order to free her from embarrassments connected with the management and otherwise, and to ensure her a fixed income, and also for the purpose of bringing the estates under proper management, it was agreed between her and *C. B. Wight* that she should sell to him the furniture and effects (except heirlooms) about *Rudge Hall*, and all debts due to her, and a bill of sale was executed carrying such agreement into effect. It was also agreed that she should give over her life estate in the real estate devised by the will and in certain heirlooms to *C. B. Wight*, an annuity of £400 being secured to her for her maintenance.

Accordingly, by an indenture dated the 28th of July, 1885, *Emma Boycott* conveyed unto *C. B. Wight* "all the real estate devised by the said will, together with all heirlooms (except jewels) thereby bequeathed as aforesaid, to hold the same as to the said heirlooms unto the said *C. B. Wight*, his heirs and assigns, during all the remainder of the life of the said *Emma Boycott*, and as to the said real estate, subject to the tenancies now affecting the same, but with the benefit of the rents reserved and arrears of rent due in respect thereof, unto the said *C. B. Wight* and his heirs, to the use that the said *Emma Boycott* may henceforth during the remainder of her life receive an annual sum of £400 (without deduction) to be issuing out of the rents and profits of the said real estate, and to be paid by two equal half-yearly payments on the 1st day of January and the 1st day of July in each year, the first payment to be made on the 1st day of January next, and subject to and charged as to the rents and profits thereof with the said annual sum, to the use of the said *C. B. Wight*, his heirs and assigns, during all the remainder of the life of the said *Emma Boycott*." The deed contained a proviso that so long as *Emma Boycott* resided with *C. B. Wight*, and was provided with certain conveniences, *C. B. Wight* should be entitled to receive out of the annual sum of £400 the annual

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sum of £245; and *C. B. Wight* thereby covenanted to pay to *Emma Boycott* the said annual sum of £400, subject to deduction of the said £245 as aforesaid.

C. B. Wight (then *C. B. Wight Boycott*) died on the 6th of August, 1891, having by his will given all his real and personal estate to the Plaintiffs, the trustees and executors therein named, upon certain trusts, and leaving his eldest son, *Thomas A. Wight Boycott*, surviving.

Thomas A. Wight Boycott being an infant, the question was raised on his behalf whether the deed of 1885 operated to merge the life estate of *Emma Boycott*, so as to entitle him to the real estate as tenant in tail in possession; and this action was brought by the Plaintiffs against *Thomas A. Wight Boycott* and *Emma Boycott* claiming a declaration that the deed of 1885 did not operate so as to cause a merger of the life estate of *Emma Boycott*, and a declaration that in any case the rent-charge of £400 was, during the life of *Emma Boycott*, a charge upon the rents and profits of the hereditaments devised by the will of *Thomas Boycott*.

Renshaw, Q.C., and *F. H. L. Errington*, for the Plaintiffs:—

We submit that the deed of 1885 did not operate to create any merger, and that, accordingly, on the death of *C. B. Wight Boycott*, an estate in the lands during the remainder of the life of *Emma Boycott* vested in the Plaintiffs, subject to the rent-charge of £400 a year. It must be admitted that an estate *pur autre vie*, being a less estate than an estate for life, will merge at law therein: *Preston* on Conveyancing (1); but by sect. 25, sub-sect. 4, of the *Judicature Act*, 1873, it is now expressly enacted that there shall not, after the commencement of that Act, "be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." Questions of merger must, therefore, now be decided according to the doctrines of equity, and "the principle by which the Court" of Equity "is guided is the intention; and in the absence of express intention, either by the instrument or by parol, the Court looks to the

(1) 3rd Ed. vol. iii. p. 225.

benefit of the person in whom the two estates become vested": *Lewin* on Trusts (1). That general proposition is supported by authority: see *Donisthorpe* v. *Porter* (2); *Lord Compton* v. *Oxenden* (3); *Brandon* v. *Brandon* (4); *Hopkins* v. *Hopkins* (5); *Countess of Shrewsbury* v. *Earl of Shrewsbury* (6). Here it is apparent on the face of the deed itself that no merger was intended. It could not have been the intention of the parties to create an estate *pur autre vie* merely in order that it should be swallowed up in an existing life estate, and the limitation of the rent-charge to *Emma Boycott* during the remainder of her life is wholly inconsistent with any such intention. Moreover, the ultimate limitation during the life of *Emma Boycott* is not merely to *C. B. Wight*, but to him, his heirs and "assigns." The whole object of the arrangement to effectuate which the deed was executed was that *Emma Boycott* should be in the position of having a fixed income during the whole of the remainder of her life, irrespectively of the duration of the life of *C. B. Wight*.

But, further, we contend that the possible estates tail in the sons of *Emma Boycott* produced a disjoining of the two life estates, which was in itself sufficient to prevent the merger: *Cordals' Case* (7); *Duncomb* v. *Duncomb* (8); *Bates' Case* (9).

Even if there was a merger as regards the two life estates, the rent-charge limited by the deed of 1885 remains unaffected.

Rashleigh, for the Defendant *Emma Boycott*, argued to the same effect, and referred to *Lewis Bowles' Case* (10); and *Preston* on Conveyancing (11).

Warmington, Q.C., and *Wace*, for the Defendant *Thomas A. Wight Boycott*, the infant remainderman:—

This is a clear case of merger. The existence of the possible estate tail in the sons of *Emma Boycott* is insufficient to prevent merger.

(1) 9th Ed. p. 819.
(2) Amb. 600; 2 Eden. 162.
(3) 2 Ves. 261, 264.
(4) 31 L. J. (Ch.) 47; 9 W. R. 825.
(5) 1 Atk. 580, 592.
(6) 1 Ves. 227; 3 Bro. C. C. 120.
(7) Cro. Eliz. 315.
(8) 3 Lev. 437.
(9) 1 Salk. 254.
(10) 11 Rep. 79 b; Tu. L. C. (Real Property) 3rd Ed. 37.
(11) 3rd Ed. vol. iii. p. 50.

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[KEKEWICH, J.:—It will be unnecessary to consider that point if I am against you on the general ground of intention.]

The question is purely one of legal effect, and not of equitable doctrines. The circumstance that the legal estate in part was outstanding in mortgagees cannot affect the construction of the deed. Sect. 25, sub-sect. 4, of the *Judicature Act*, 1873, applies solely to "merger by operation of law only." This is not a case of merger by operation of law only, but of the surrender of a previous estate. Surrender and merger, though often confounded, are wholly distinct; the one arising by act of the parties, and the other by operation of law: *Preston* on Conveyancing (1); *Sheppard's Touchstone* (2). It follows that as the case is not within the sub-section, and the limitations are in part legal, their true legal effect must be given to them irrespectively of the intention of the parties.

Further, it is submitted that there is no evidence of any intention of the parties sufficient to prevent the merger, which would undoubtedly have taken effect in law, from taking effect in equity also. It may be surmised that the event which has happened, of the death of *C. B. Wight* in the lifetime of *Emma Boycott*, was not in the contemplation of the parties. The object was that she should receive a rent-charge of £400 a year as the consideration for her relinquishing the dominion of the estate to her successor in title. The words "heirs and assigns" are mere words of limitation.

KEKEWICH, J.:—

To my mind, the question may conveniently and properly be decided on the consideration of the first point only. At the date of the deed of the 28th of July, 1885, the estates in question stood limited, in the events which had happened, to the use of *Emma Boycott* for life, with remainder to the use of her sons successively in tail, with remainder to the use of *Cathcart B. Wight* for life, with remainders over, under which the infant now claims. I am not considering the effect of the remainders to the sons of *Emma Boycott*, which has been so much discussed with

(1) 3rd Ed. vol. iii. p. 23. (2) 7th Ed. vol. ii. ch. xvii. p. 300.

reference to the other point. For the present purpose the case may be considered as if those remainders were omitted, and as if *C. B. Wight* was tenant for life in remainder, immediately expectant on the decease of *Emma Boycott*. The effect of the deed of 1885 is to convey the estate of *Emma Boycott* to *C. B. Wight*. There is not—according to the statement contained in the statement of claim, which I am told is sufficient and full—any indication there that the one estate should, in a popular sense, merge in the other. There is nothing to shew that the two estates were not intended to co-exist. By the deed *Emma Boycott*, the grantor, conveys—she does not purport to surrender or otherwise release, but she conveys—the estate to *C. B. Wight*, the grantee. That is in itself an indication of what the parties intended. The life estate of *Emma Boycott*—that is to say, the estate during her life—is conveyed to *C. B. Wight*, and he is to hold it during the life of *Emma Boycott*, so that her life estate is changed by the conveyance from an estate for her life existing in her to an estate for her life existing in *C. B. Wight*. It is admitted that for the purposes of merger an estate *pur autre vie* is less than an estate for the life of the tenant for life, and that if the doctrine of merger applies, the less estate would be merged in the greater, according to that doctrine. But that any person, professional or lay, should deliberately create an estate *pur autre vie* by the conversion I have mentioned, in order that it should immediately sink into a life estate and be lost, is, to my mind, incredible. I will go further and say that I think the parties must have intended to keep the two estates separate. That is the only inference I can draw from the language of the deed, and it is to be observed that it is the language of the deed alone on which I rely, the facts set out in the statement of claim not being regarded by me as bearing on the point the one way or the other. I take the deed itself. Then omitting from consideration, as I think I ought to do, the limitation in the will to the sons of *Emma Boycott*, and the reference in the deed of 1885 to the heirs and assigns of *C. B. Wight*, I find the creation of a legal rent-charge during the whole of the life of *Emma Boycott*; and yet, if it was not their intention that that should exist during the whole of her life, but that it should cease when *C. B. Wight*

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died, then the parties intended that something should be done other than that which they have clearly expressed. To say that the deed ought to be read as intending that *Emma Boycott* should receive an annuity of £400 a year during so much of the remainder of her life as should be concurrent with the life of *C. B. Wight*, is to stultify the deed, and to say in reality that the framers of it, or parties to it, set themselves to create a legal puzzle instead of carrying out a very simple arrangement that for the rest of her life she should take £400 yearly, instead of the rents and profits of the estate. If I am allowed to decide the case according to the intention, there does not seem to be much room for doubt, and the 4th sub-section of sect. 25 of the *Judicature Act*, 1873, leaves it to me to decide it in that way. Mr. *Waces* says that this would not be a merger by operation of law only within the words used in the sub-section. I think that what is meant there is that, where there would not be a merger both at law and in equity, then the merger shall not follow, shall not be concluded, because it would operate at law; but that where there would be a merger both at law and in equity, then the merger is to exist notwithstanding the provisions of the Act. That being my view of the intention and of the law, I need not consider the other nice point, which otherwise might exercise me for some time and take me into a great many books which nowadays are not so much consulted as of old. There must be a declaration that the deed of 1885 did not operate so as to create any merger.

Solicitors: *Patersons, Snow, Bloxam, & Kinder; Prior, Church & Adams.*

C. C. M. D.

HILL *v.* WALLASEY LOCAL BOARD.

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[1892 H. 1490.]

1892 May 27.

Local Authority—Water Supply—Landowner—Private Road—"Street"—Entry and digging up without Consent of Owner—Injunction—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29 [*Revised Ed. Statutes, vol. x., p.* 66]—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 54, 57 [*Revised Ed. Statutes, vol. xvii., pp.* 528, 535, 544].

Although a private road is a "street" within sect. 4 of the *Public Health Act*, 1875, the wide powers given to a local authority by sects. 16 and 54 to carry water-mains through any "street" in their district for the supply of water within the district, are controlled by sect. 57, incorporating sect. 29 of the *Waterworks Clauses Act*, 1847, which prohibits any private land being entered upon and broken up for the purpose of laying mains without the consent of the owner; and the Court will therefore grant an injunction at the instance of the owner of any private road entered upon by the local authority for the purpose without his consent.

IN March, 1891, certain lands in the parish of *Wallasey*, in the county of *Chester*, were sold and conveyed to the Plaintiff in fee simple. The property so purchased included so much of a road, called "*Sea View Road*," as passed through the lands purchased. This part of the road had for some forty years prior to the purchase existed as a private road, and the Plaintiff asserted that it still continued to be a private road and, as such, was his property by virtue of the conveyance to him. The road now formed the continuation of a road running north and south—the whole being called "*Sea View Road*"—starting from the village of *Liscard*, which lay to the south of the Plaintiff's property; the portion of the road between *Liscard* and the point of junction with the southern end of the Plaintiff's portion being the property of the Defendants, the *Wallasey Local Board*. The entire road had, it was said, for some years past become a main thoroughfare from *Liscard* to a district lying beyond the Plaintiff's property, and the Defendants had, under sect. 150 of the *Public Health Act*, 1875, constructed a footpath along one side of the Plaintiff's road. The Plaintiff after purchasing the property put up building

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notices upon it and proceeded to develop it as a building estate, and he had already sold for building purposes various plots of land along each side of his portion of "*Sea View Road*," and abutting thereon.

At the southern end of his portion of the road the Plaintiff had, upon purchasing the property, put up a notice-board marked "Private road," and at the northern end was an old gate, but this, it appeared, had for some years been usually left open, though the Plaintiff said that since he purchased the property he had been in the habit of keeping the gate locked, and allowing only those persons to pass through to whom he had given permission to do so. This gate, however, extended across the carriage-way only, and not the footway also. There was a conflict of evidence as to whether the gate was usually kept open or locked.

In April, 1892, the Defendants, without notice to the Plaintiff and without any consent on his part, commenced excavating a trench at the southern end of the Plaintiff's portion of the road for laying down along that portion water-mains for conveying water from a well the Defendants were sinking in the neighbourhood of the Plaintiff's property to part of their district lying beyond that property, and for supplying ratepayers along the road, whereupon the Plaintiff issued the writ in this action, and on the 14th of April, 1892, obtained, *ex parte*, from Mr. Justice *Jeune*, sitting as Vacation Judge, an *interim* injunction restraining the Defendants from digging any trenches in or otherwise disturbing or interfering with the soil of the Plaintiff's portion of the road, and from laying down any pipes in such portion, and from committing any trespass thereon.

The Plaintiff now moved, on notice, to have the injunction continued until the trial of the action or further order.

The questions raised by the action and motion was whether the Plaintiff's portion of "*Sea View Road*" was a "street" within the *Public Health Act*, 1875, and whether the Defendants were entitled to lay down water-mains along it without his consent.

Warmington, Q.C., and *W. D. MacConkey*, for the Plaintiff:—

The question is, what is the effect of sect. 54 of the *Public*

Health Act, 1875 (38 & 39 Vict. c. 55), which says that "where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force." Sects. 51, 52 and 53, under which a local authority is empowered to supply their district with water, shew that, before the local authority can exercise the power, they must have a public inquiry into the propriety of the intended works. Sect. 54, which imposes on them the same restriction in laying down water-mains as they are subject to for laying down sewers, must refer to sect. 16, which says that "any local authority may carry any sewer through, across or under . . . any street or place laid out as or intended for a street," that is to say, any street which may be dealt with under the Act. Then sect. 57 incorporates certain provisions of the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), including the provision "with respect (where the local authority have not the control of the streets) to the breaking up of streets for the purpose of laying pipes." That includes sect. 28 of the *Waterworks Clauses Act*, 1847, which empowers the undertakers to break up streets for laying down pipes, and also sect. 29, which qualifies sect. 28 by prohibiting them from entering on any private land for laying down pipes without the consent of the owner; so that the Acts draw a clear distinction between public and private rights. In the present case no notice has been given to or consent obtained by the Defendants from the Plaintiff as owner of this private road. Accordingly we say that under the provisions of sect. 57 of the *Public Health Act*, 1875, he is entitled to an injunction for a breach of those provisions, apart from any reasons or motives of his own: *Goodson* v. *Richardson* (1).

But supposing sect. 57 has not the effect which we contend it has, then we must consider the construction of sect. 16, under which the Defendants seek to justify their proceedings. It is true that the word "street" in that section includes, under the interpretation clause, sect. 4, any "road . . . whether a

(1) Law Rep. 9 Ch. 221.

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thoroughfare or not;" but that interpretation is not to prevent the word "street" from receiving its ordinary popular and natural sense whenever that is properly applicable; and in the natural and popular sense a "street" is a roadway with buildings on each side: *Robinson* v. *Local Board of Barton-Eccles* (1). Upon that view, the road now in question is not a "street," and, therefore, not within the purview of sect. 16 at all. It is simply a private road, and if a public body takes private property under the *Public Health Acts*, they must make compensation: *per* Sir *G. Jessel*, M.R. in *Taylor* v. *Corporation of Oldham* (2). As that case may be relied on by the Defendants, it should be noticed that that was a case of constructing sewers and not waterworks. As to payment of compensation, some distinction may be drawn between making a sewer and constructing waterworks, for in the former case a local authority derives no profit from a sewer, and, therefore, may not be required to give notice and pay compensation, whereas waterworks being a source of profit to them, they may properly be required to pay, and should therefore give notice before they enter upon land. But even assuming that this road is a "street," we contend that sect. 57 of the *Public Health Act*, 1875, incorporates sects. 28 and 29 of the *Waterworks Clauses Act*, 1847, in which a clear distinction is drawn between streets that are public and streets that are not; and no difference can be made between a waterworks company supplying water and a local authority who undertake the duties of a waterworks company.

Renshaw, Q.C., and *W. M. Cann*, for the Defendants:—

We contend that this road is a "street or place laid out as or intended for a street," within sect. 16, and therefore that by force of sects. 54 and 16, aided by sect. 4, we are empowered to lay down our water-mains without notice. For the proposition that this is a "street," we rely on *Taylor* v. *Corporation of Oldham*. There Sir *G. Jessel* observes (3) that sect. 16 of the *Public Health Act*, 1875, expressly calls places "streets," whether they are public or private property; and in *Midland Railway Company* v.

(1) 8 App. Cas. 798, 801. (2) 4 Ch. D. 395, 400.
(3) 4 Ch. D. 407.

Watton (1), Lord Justice *Lopes* adopted Sir *G. Jessel's* definition in the former case, saying it is a distinct authority that it is immaterial, for the purpose of the Act of 1875, whether a road is private or public. Again, in *Jowett* v. *Idle Local Board* (2), the place held to be a "street" within the Act was very private indeed. *Goodson* v. *Richardson* (3) has no application: that was merely a contest between two private individuals—an ordinary case of a private individual committing a trespass by laying down mains for his own private purposes in land belonging to another. The judgment of the Court of Appeal proceeded entirely on the ground of trespass (4): the Court was not contemplating the case of a body acting under parliamentary authority at all. We submit that the effect of sect. 57 of the Act of 1875 is to confer additional powers upon a local authority, and not to cut down the wide powers given by sects. 16 and 54. It is merely a collateral section. For the present purpose, sect. 16 is wide enough to justify us in what we are doing. If we are right in proceeding under that section, we can lay our mains without compensation, whereas, if we were to proceed under other sections, we should have to pay. On the question of convenience or inconvenience, we ought not to be prevented by an *interim* injunction from supplying water in our district. If at the trial it should turn out that we are wrong, then it is a mere matter of compensation.

Warmington, in reply:—

The wide powers given by sect. 54 of the *Public Health Act*, 1875, by reference to sect. 16, should be read as controlled by the express prohibition in sect. 29 of the *Waterworks Clauses Act*, 1847, that private property shall not be entered upon without the consent of the owner. That makes the provisions of the two Acts consistent. It has never been held that where a local authority supply water they are exempt from the provisions of the *Waterworks Act*. This is the first case of the kind, and there is no reported authority precisely in point, for *Taylor* v. *Corporation of Oldham* (5) deals only with the question of laying down

(1) 17 Q. B. D. 30.
(2) 36 W. R. 138, 530.
(3) Law Rep. 9 Ch. 221.
(4) Ibid. 224-5.
(5) 4 Ch. D. 395.

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a sewer. If this road is treated for the purposes of the *Public Health Act* as a "street," we cannot develop our property. We contend that, if the Defendants choose to undertake the supply of water within their district, they are bound by the provisions of the *Waterworks Act*.

KEKEWICH, J.:—

In my opinion, the evidence before me upon this motion shews that this is a private road; indeed there is really nothing against that view except the fact that the Plaintiff has from time to time sold a part of his property near this road for building purposes; that he is proposing to sell more; and that he has put up notices treating the land as land for sale; from all of which circumstances I am asked to infer that he must have given his purchasers or licensees power to use this road, and that he must in future contemplate giving to other persons a power to use the road; for, without that, what he has done or desires to do would be futile. That does not seem to me to go far towards shewing that the road is other than a private road. He may have contracted and he may intend to contract grants to persons claiming under him of rights to use this land; but those rights would be private rights, or rights arising out of a contract determinable by the contracting parties, and by no means equivalent or anything like equivalent or approaching to a dedication to the public. Therefore, on the materials before me, I must regard this as a private road.

Now, being a private road, it still is a "street" within the meaning of the *Public Health Act*, 1875. That was decided directly by Sir *G. Jessel* in the case of *Taylor* v. *Corporation of Oldham* (1), and that view was adopted in the later case of *Midland Railway Company* v. *Watton* (2), where Lord Justice *Lopes* referred to that case. I must regard this road, therefore, notwithstanding that it is a private road, as a "street" within the interpretation clause, sect. 4, of the *Public Health Act*, 1875, and, therefore, within the meaning of the word "street" wherever it is used in that Act. So far one arrives at this, that the Act of 1875 may apply to such a road as this; but that is only a small

(1) 4 Ch. D. 395, 407. (2) 17 Q. B. D. 30, 42.

way towards a conclusion. If the Defendants are entitled to do what they propose to do, it is because, by the reference in sect. 54 of that Act to the previous sect. 16, they have, as regards the supply of water, precisely the same powers which are given to them as regards the construction of sewers, without any other restrictions than are imposed on them as regards the construction of sewers. One approaches the construction of an Act like this, with reference to a question such as I have to deal with here, with a reasonable anticipation that, where private rights are invaded, compensation will be awarded notwithstanding that the invasion is for the public benefit, and that the invasion will not be permitted unless or until the compensation has been secured. It is not difficult to see that the construction of sewers by a local authority may be as much an invasion of public rights as the construction of water-mains, but may nevertheless not demand compensation on the same basis, because sewers as a rule are necessarily for the benefit of the land through which they are constructed, and it is a public work out of which I believe no one has ever yet been able to make any profit. I think experience shews that the conveyance of sewage from land imposes rather a liability than a profit. On the other hand, it is fair to remember, as Mr. *Warmington* pointed out, that a local authority supplying water is doing that which may be profitable; and therefore I think it is only reasonable to lean to an interpretation which demands compensation in such a case. There is no doubt that sect. 54 does refer directly to sect. 16, and I think the proper way of construing the Act is to read sect. 16 as repeated in sect. 54. This latter section says, "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district." Reading sect. 16 into that section you have these words: "Any local authority may carry any water-main or pipe through, across, or under any turnpike road, or any street or place laid out as or intended for a street," and so forth, after giving reasonable notice. Then sect. 57 incorporates the *Waterworks Clauses Act*, 1863, and certain provisions of the *Waterworks Clauses Act*,

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1847. The reason of that incorporation is given in the same section, namely, "for the purpose of enabling any local authority to supply water." It seems to me that if I were to adopt the construction of the Defendants, I should, for the present purpose, be giving those words no meaning whatever. The incorporation is for the purpose of enabling the Defendants to do that which they could not do without it. Why the *Waterworks Clauses Act*, 1847, should be incorporated for the purpose of enabling them to supply water if, as a matter of law, they could do everything for the supply of water without that incorporation, it is somewhat difficult to conceive. I see no answer to that way of looking at the construction of the section. There is nothing, to my mind, opposed to the ordinary rule of construction in considering that sect. 54, read in the way that I have read it, that is, in the widest terms, should be followed immediately by restrictions which are not to be found in the section itself, and which are not to be found in the earlier parts of the Act that deal with sewage, but yet must be read, not as part of the same clause, but as part of the same branch of law. For instance, turning back to sect. 51, I have a *fasciculus* of clauses, headed "water supply," which are described as "powers of local authority in relation to supply of water"; and powers are, to the extent I have mentioned, created by reference, but they are also restricted in the way mentioned in sect. 57; restricted, that is to say, because it is necessary to give the local authority the power there mentioned in order to enable them to do what they could not otherwise do.

Then, if I turn with that construction to the *Waterworks Clauses Act*, 1847, I find that that Act contains provisions "with respect to the breaking up of streets for the purpose of laying pipes," provisions which are incorporated into the *Public Health Act*, 1875, by sect. 57 of that Act. One of these provisions, being sect. 29 of the *Waterworks Act*, enacts that the undertakers shall not enter private land without the consent of the owner; and sect. 30 requires the undertakers, before they break up streets, to serve all persons under whose control the streets are with notice of their intention; shewing that, where it is proposed to break up a public street under the control of the local authority, the local

authority who are exercising their powers under the *Public Health Act* have nothing to do but to give notice to themselves, a notice which may or may not be dispensed with; but where other persons are interested, and particularly where the land entered upon is private land, then the consent of the owner must be obtained. What has to be done if his consent is not obtained, that is to say, what provisions there are for compensation under the compulsory clauses, I am not now concerned with; but what I am concerned with in the present case is that the local authority have not yet obtained the consent of the owner, and he insists that they are bound to obtain his consent. Upon the construction I place on the *Public Health Act*, it seems to me that consent is necessary, and, therefore, this injunction must be continued until the trial, the Plaintiff of course giving the usual undertaking in damages.

Solicitors: *Brook, Freeman & Batley*, agents for *Wright, Becket & Co., Liverpool; Frith Needham*, agent for *W. Danger, Egremont.*

G. I. F. C.

In re PINKNEY & SONS STEAMSHIP COMPANY.

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June 18, 28; *Aug.* 6.

Company—Reduction of Capital—Partial Reduction—One Class of Shares—Shareholder—Voting Power—Articles of Association, alteration of—"And reduced"—Companies Acts, 1867 *and* 1877.

The Court has power, under the *Companies Acts*, 1867 and 1877, to sanction a resolution by a limited company for a partial reduction of one class of its shares, as for instance, a reduction of original shares already issued and fully paid up, leaving the unissued shares unreduced; but, if the company's articles of association confer on each shareholder a voting power proportionate to his holding of original shares, the Court will, before sanctioning the reduction, require that the company shall alter its articles so as to make the voting power proportionate to the reduced capital.

The Court will not, on the hearing of a petition by a limited company for reduction of capital, at once dispense with the addition of the words "and reduced" to the company's name; that addition being requisite to give, for such a period as the Court thinks reasonable, a warning to the public of the financial position of the company.

PETITION.

Pinkney & Sons Steamship Company, Limited, was a company

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incorporated in 1885 under the *Companies Acts*, its objects being the acquisition and management of vessels of every description. Its nominal capital was £350,000, divided into 35,000 shares of £10 each. The company issued 20,534 shares only, upon each of which £10 had been fully paid, leaving 14,466 shares unissued. The company's articles empowered it from time to time to reduce its capital; and art. 60 provided that "Every member who may vote, either in person or by proxy, shall have one vote for every complete number of ten shares."

By a special resolution of the company, passed and confirmed in March and April, 1892, it was resolved that the capital, which then consisted of £205,340, divided into 20,534 shares of £10 each fully paid up, should be reduced to £154,005, divided into 20,534 shares of £7 10*s.* each fully paid up, and that such reduction should be effected by cancelling paid up capital to the extent of £2 10*s.* per share. This petition was presented by the company to have the special resolution sanctioned by the Court.

The form of minute which it was proposed to register was as follows: "The capital of the company is £298,665, divided into 14,466 shares of £10 each, none of which have been issued, and 20,534 shares of £7 10*s.* each, all of which have been issued, in lieu of the original capital of £350,000, divided into 35,000 shares of £10 each."

Hadley, for the Petitioners:—

The question is whether, under the *Companies Act*, 1867, ss. 9 and 11, and the *Companies Act*, 1877, the Court may sanction the reduction of part only of one class of capital. This question has never actually been decided in any reported case, but it was left open by your Lordship in *In re Agricultural Hotel Company* (1), where you sanctioned a resolution for the reduction of two classes of capital. There is nothing in the Act prohibiting a reduction in any form which may be decided by a resolution of the company: the power given to the Court to confirm a resolution for reduction is a discretionary power: *In re Direct Spanish Telegraph Company* (2).

[He also referred to *In re Barrow Hæmatite Steel Company* (3);

(1) [1891] 1 Ch. 396. (2) 34 Ch. D. 307. (3) 39 Ch. D. 582.

In re Quebrada Railway, Land, and Copper Company (1); *In re Union Plate Glass Company* (2); *In re Gatling Gun, Limited* (3); *In re American Pastoral Company* (4); and *Buckley* on Companies (5).]

[KEKEWICH, J.:—My point is this: the scheme of the *Companies Act*, 1882, s. 12, was that no alteration should be made by any company in the conditions contained in its memorandum of association except as thereby provided. The *Companies Acts*, 1867 and 1877, enlarge the exceptions and give power to a company to reduce its capital. Do you say you have statutory powers to do what you now propose?]

I submit that as the Acts of 1867 and 1877 do not prohibit a company from reducing part only of one class of capital, including paid-up capital, it can be done, and the authorities support this view.

[*C. T. Mitchell*, as *amicus curiæ*, said that in *In re Newbery-Vautin (Patents) Gold Extraction Company*, before Mr. Justice *Stirling*, on the 19th of March, 1892, an order was made sanctioning a resolution similar to that in the present case (6).]

(1) 40 Ch. D. 363.
(2) 42 Ch. D. 513.
(3) 43 Ch. D. 628.
(4) W. N. (1890) 62.
(5) 6th Ed. pp. 537, 545.
(6) Stirling, J., March 19, 1892.

In re NEWBERY-VAUTIN (PATENTS) GOLD EXTRACTION COMPANY, LIMITED.

THE company was incorporated in 1887, with a nominal capital of £100,000, in 100,000 shares of £1 each. By the articles of association the company was empowered to reduce its capital. The whole of the capital was subsequently issued and fully paid. By a special resolution of the company passed and confirmed in January and February, 1892, it was resolved that the capital should be reduced from £100,000 to £40,000, by substituting for every complete number of five shares of £1 each, fully paid, held by any member, two shares of the same amount, credited as fully paid, and reducing the amount of every fully paid-up £1 share in a holding less than five and beyond a multiple of five, to 8s., and by cancelling the sum of £60,000, the rest of the company's capital, which had been lost or was unrepresented by available assets.

This was a petition to have that resolution confirmed. The form of minute proposed to be registered was as follows: "The capital of the *Newbery-Vautin (Patents) Gold Extraction Company, Limited*, is now £40,000, divided into 39,954 shares of £1 each, and 115 shares of 8s. each, upon each of which £1 and 8s. a share respectively the whole amount is to be deemed to be paid up, instead of

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In *In re Continental Union Gas Company* (1), Mr. Justice *Chitty* dismissed a petition for reduction, but on the ground that the proposed reduction would alter the articles in respect to a shareholder's voting power. Here, it is true, art. 60 gives each shareholder a right to one vote for every complete number of ten shares, that is, £10 shares; but, if necessary, the company could, by resolution, alter this article by adapting it to the proposed reduction, and therefore, the existence of the article in its present form ought not to be regarded as a ground for dismissing the petition. Here, the shares which will have a lesser voting power have not been issued, whereas, in the case before Mr. Justice *Chitty*, they had been issued.

1892. June 28. KEKEWICH, J.:—

On the hearing of the petition, I expressed a doubt whether the particular reduction of capital which was proposed was within the meaning of the Acts which enable the Court to sanction resolutions of this character. The question arises in this way. The original shares of the Court were £10 each, and it is now proposed on reduction to treat the shares as consisting partly of £7 10s. each, and partly of £10 each: in other words, to establish henceforth two classes of shares. A doubt upon the subject has already been expressed by me in *In re Agricultural Hotel Company* (2); and, so far as I am aware, the particular question has never been considered by the Court. I invited Mr. *Hadley*, as counsel for the Petitioners, to discuss the Acts of Parliament, and to convince me if he could that the case falls within the words of the statute. Mr. *Hadley* declined to do that, saying, as he was quite entitled to do, that he preferred to rest his argument on the decided cases. I reserved judgment

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the original capital of £100,000, divided into 100,000 shares of £1 each credited as fully paid up."

C. T. Mitchell, for the Petitioners.

STIRLING, J., made an order confirming the resolution, and directed the order to be produced to the Registrar of Joint Stock Companies, and an office copy thereof delivered to him, together with a minute in the form set forth in the schedule, the form being the same as that above stated.

Solicitors: *Snell, Son & Greenip.*

(1) 7 Times L. R. 476.

(2) [1891] 1 Ch. 396.

in order that I might do what I thought ought to be done, namely, consider the Acts of Parliament; and I intended to discuss the Acts from 1862 downwards, in order to see what was the limit and extent of the power to reduce capital as applied to a case like the present; but before I got very far in the consideration of the matter, I was able to turn to one authority which, though mentioned in the course of the argument, was not presented to me in a complete form, namely, the case of *In re Newbery-Vautin (Patents) Gold Extraction Company*, before Mr. Justice *Stirling*, on the 19th of March, 1892 (1). That was also a petition for the reduction of capital, and raised the particular question now before me. Whether the case was argued or not before Mr. Justice *Stirling*, I do not know; but by the courtesy of the Registrar, I have seen the original petition and a copy of the order made by Mr. Justice *Stirling* upon it. The order, according to the usual practice, states the minute which was to be registered; and his Lordship sanctioned the proposed reduction, effecting a division of the original shares into two classes. The point of the reduction there was that every holder of a complete number of five £1 shares, was to receive two £1 shares of the reduced capital, and that every holder of £1 shares less than five, and beyond a multiple of five, was to hold each of such £1 shares as reduced to 8*s.*; the whole of the original capital thus being reduced as to part, and unreduced as to the remainder. That case was, therefore, substantially the same as the present; and, having that authority before me, I do not think it would be becoming or convenient on my part to discuss the Acts of Parliament. I think my duty is to say that, the matter having been considered, as I have no doubt it was considered by Mr. Justice *Stirling*, and that learned Judge having made an order of that kind, I ought not to entertain the slightest doubt that the order was right. The other cases that were referred to do not go to shew that Mr. Justice *Stirling's* view was otherwise than right. There is no conflict of authority. Therefore, on that ground, which I think is a sound one, I should be prepared to make the order asked for. The petition is right in form, and is in other respects a proper one, and I should be prepared to

(1) *Ante*, p. 127, n.

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make an order upon it. But there is one point which I ought to mention. Under clause 60 of the articles of association every member voting at any meeting of the company is entitled to have one vote for every complete number of ten shares. Now, the effect of that article upon the proposed reduction has at present not been considered by the company; and I think it not improbable that there are other articles deserving some consideration. I have not myself considered any other; but I think that, when considering this particular article, the company will be well advised if they consider others. What is proposed now is to have some shares of £10 each, and some of £7 10s. each. The result will be that each shareholder will be entitled to exactly the same number of votes whether he holds £7 10s. shares or £10 shares; and that would be an interference with the constitution of the company. The same point came before Mr. Justice *Chitty* in *In re Continental Union Gas Company* (1), which was cited by Mr. *Hadley*. There Mr. Justice *Chitty* is reported to have said that "it appeared by the company's articles that its members were to be entitled to one vote in respect of each share. It was therefore clear that if the proposed reduction was sanctioned by the Court and the conversion of the shares into stock was carried out the holders of £14 shares would only get votes for every £20 of stock they might hold. This was by itself a fatal blot, and on this ground, and without going into any other questions, he dismissed the petition." I suppose Mr. Justice *Chitty* was not asked to adjourn the petition for further consideration, and I must not presume what his Lordship would have done if he had so adjourned the petition; but it does not strike me that the change made in the voting power by the proposed reduction is necessarily "a fatal blot." Articles of association are alterable, and if they are altered I see no reason for saying that what may have been a fatal blot under the original articles will necessarily be so under the amended articles.

What I must do now is to allow this petition to stand over generally with liberty to apply in order that the company may consider this point. If the matter remains as at present, I must dismiss the petition, and I must follow Mr. Justice *Chitty* in

(1) 7 Times L. R. 476.

that respect, for in his judgment I entirely concur. Therefore, if the articles are not altered on the footing of the proposed reduction, the petition must be dismissed; but if the company desire that the petition should stand over it may do so.

Mr. *Hadley*:—

I ask that the petition may stand over, and that the use of the words "and reduced" may now be dispensed with.

KEKEWICH, J.:—

I will allow the petition to stand over, but I decline at present to dispense with the words "and reduced." It is my practice to require that in such cases the company shall use the words "and reduced" for a considerable period. The words are required by the statute to be used as a warning to the public that the company whose capital is being reduced is not in a flourishing condition. I think that in the present case the public should have this reasonable warning.

The petition was amended accordingly, and a final order made on the 6th of August, 1892.

Solicitors: *Stocken & Jupp*, agents for *Pinkney & Bolam Sunderland.*

G. I. F. C.

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1892 July 1, 8.

In re HIGGINBOTTOM.

New Trustees—Appointment by Court—Existing Trustee—Statutory Power—Beneficiaries, wishes of—Practice—Jurisdiction—Trustee Acts, 1850 *and* 1852 (13 *&* 14 *Vict. c.* 60 [*Revised Ed. Statutes, vol. x., p.* 981]; 15 *&* 16 *Vict. c.* 55 [*Revised Ed. Statutes, vol. xi., p.* 326])—*Conveyancing and Law of Property Act*, 1881, *s.* 31.

The Court has no jurisdiction, under the *Trustee Acts*, to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory power of appointing new trustees under sect. 31 of the *Conveyancing and Law of Property Act*, 1881, even though the application to the Court is made by a majority of the beneficiaries, and the existing trustee has himself no beneficial interest.

JOSEPH HIGGINBOTTOM, by his will, dated in 1831, directed his real and personal estate to be divided among his children and grandchildren in certain shares, and appointed *Edward Lees* and his son *John Higginbottom* his executors.

The testator died in 1834, and his will was shortly afterwards proved by both the executors. Several points of construction arose upon the will; but it appeared that the legal estate of the property therein comprised became vested by implication in the executors, *Edward Lees* and *John Higginbottom*, as trustees.

John Higginbottom survived *Edward Lees*, and died in 1853, having by his will devised his trust estates to his wife, *Sarah Higginbottom*, and appointed her his executrix. *Sarah Higginbottom* by her will, dated the 16th of March, 1885, devised her trust estates to her daughter, *Mary Jane Broadbent*, whom she appointed her executrix. *Sarah Higginbottom* died on the 18th of March, 1885, and her will was proved by *Mary J. Broadbent* on the 2nd of May, 1892.

On the 23rd of February, 1892—that is, before *Sarah Higginbottom's* will was proved—an originating summons under the *Trustee Act*, 1850 (13 & 14 Vict. c. 60), and the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), was taken out in the *Manchester* District Registry, by one of the beneficiaries under the will of *Joseph Higginbottom*, for the appointment of *William Wood* and *Ralph Rupert Wood* (who had been selected for the purpose by a

large majority of the beneficiaries) as trustees of that will in substitution for *Edward Lees* and *John Higginbottom*, and for a vesting order. The other beneficiaries under the will who desired the appointment were made Respondents to the summons; but before the will of *Sarah Higginbottom* was proved the summons was amended, by adding as Respondents her executrix, *Mary Jane Broadbent*, who professed a desire of herself appointing new trustees under the statutory power vested in her by sect. 31 of the *Conveyancing and Law of Property Act*, 1881, and two beneficiaries, who, though not objecting to the fitness of the proposed trustees, supported *Mary Jane Broadbent*.

On the 20th of May, 1892, Mr. Justice *Kekewich* made an order in Chambers on the amended summons, appointing *William Wood* and *R. R. Wood* trustees of the will of *Joseph Higginbottom*, but, as the order stated, without giving any costs to any of the parties. The order did not contain any direction vesting the trust estate in the new trustees.

Mary Jane Broadbent and the two dissentient beneficiaries then served the Applicant and the other beneficiaries with notice of motion to discharge the order.

The property subject to the trusts of the will of *Joseph Higginbottom* was of small value, consisting of some cottages in *Dukinfield* and *Ashton-under-Lyne*.

The beneficiaries under the will who desired that the order should stand were numerous, and represented about five-sixths of the whole beneficial interest; while the dissentient beneficiaries represented about three-twentieths only. *Mary Jane Broadbent* herself took no beneficial interest whatever under the will, and was an illiterate person of no means.

The substantial question raised by the motion was whether, under the circumstances, the Court had jurisdiction under the *Trustee Acts* to appoint new trustees, notwithstanding that *Mary Jane Broadbent* was desirous of exercising her statutory power under sect. 31 of the *Conveyancing Act*.

Roby, for the motion:—

It is settled that the Court has no jurisdiction to take away the power of appointing new trustees from the donee of the

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power, whether the power is given by statute or otherwise, when the donee is able and willing to exercise the power: *In re Hodson's Settlement* (1); *In re Gadd* (2); *In re Hall* (3); *In re Gibbon's Trusts* (4); *In re Sutton* (5). A further objection is, that there are some beneficiaries not before the Court, and their absence is not accounted for. Moreover, the order made in Chambers is wrong in form, the effect of it being to deprive my client, the existing trustee, of costs which, as trustee, she is entitled to: this the Court has no jurisdiction to do.

Roskill, in support of the order in Chambers:—

The order made in Chambers was made by your Lordship on a full consideration of the matter, the application being made by a large majority, five-sixths, of the beneficiaries. This motion is vexatious; for the existing trustee has no beneficial interest whatever in this small estate, and she is an illiterate person of no means.

With regard to the practice or jurisdiction, the question is, What is the effect of sect. 31 of the *Conveyancing and Law of Property Act*, 1881? If it was intended to lay down in *In re Gibbon's Trusts* that, since the *Conveyancing Act*, the Court has no jurisdiction to appoint new trustees where there is an existing trustee who can appoint, I submit that is not sound. As a matter of fact, the order was made in that case. Sect. 31 of the Act did not intend to take away the power of the Court to appoint new trustees. *In re Sutton* was a Lunacy case.

Roby, in reply:—

In re Gibbon's Trusts is in no way contradictory to the earlier cases. The donee of the power was himself one of the petitioners, and thus waived his power to appoint, the order being made with his consent.

KEKEWICH, J.:—

I must consider this case. It is very important that there

(1) 9 Hare, 118.
(2) 23 Ch. D. 134.
(3) 33 W. R. 508.
(4) 30 W. R. 287.
(5) W. N. (1885) 122.

should be no deviation from the established jurisdiction and practice under the *Trustee Acts*. I do not suppose that any one outside the litigant parties in this case can doubt that it is the duty of the Court to appoint as trustees, if it can possibly do so, the persons whom a large majority of the beneficiaries desire to be appointed; but whether this can be done on the present application is a question of general importance.

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Mary Jane Broadbent, the legal personal representative of the last surviving executor of the testator's will, insists that, she being willing to exercise such powers as are vested in her by statute or otherwise, including that of appointing new trustees, no order for the appointment of new trustees can properly be made by the Court. The question was argued as one of jurisdiction, and probably that is the proper view of the question which has to be decided. It is immaterial, however, whether the Court has no jurisdiction, or, having it, declines to exercise it; and my judgment proceeds upon grounds equally applicable to either position.

The non-interference by the Court with the legal power of appointment of new trustees is established by several cases. *In re Gadd* (1) is now generally cited on the point; but I take the principle to be stated clearly in *Tempest* v. *Lord Camoys* (2), *In re Gadd* only adapting that principle to the particular case.

The same principle is to be found in *In re Hodson's Settlement* (3). The remarks of Mr. Justice *Kay*, in *In re Gibbon's Trusts* (4), which was a consent petition, do not in any way militate against this.

There are many points for consideration in the particular case before me, such as the devolution of the legal estate and the construction of the will as regards the beneficial interest, which may be passed over now with the single observation that they present difficulties sufficient to make one pause; and I will deal only with the one question I have already noticed.

No objection has been taken to either of the trustees proposed

(1) 23 Ch. D. 134.
(2) 21 Ch. D. 571.
(3) 9 Hare, 118.
(4) 30 W. R. 287.

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by the Applicants. They have been selected by a number of persons who are largely interested in the estate, and to whose voice weight ought to be given. *Mary Jane Broadbent* is not herself a beneficiary, and probably her zeal is due to the influence of others rather than to any honest desire on her own part to act as trustee. In any further proceedings in this matter—and I apprehend that further proceedings are probable—the influence to which I have alluded will require to be carefully watched. It will be the duty of any Judge before whom the matter comes to take such care as his power enables him to do that the zeal to which I have referred does not cast more than a proper proportion of costs on this small estate. She can, however, in my opinion, use her legal power to prevent an advantageous appointment of new trustees, and, to that extent, at any rate, increase the cost of administering the estate. Therefore, now that I have had an opportunity of fully considering it, the order made at Chambers, the pronouncement of which was, I think, dictated rather by an earnest desire to do what was the best for all concerned than by strict adherence to legal rules, must be discharged. In discharging it, I have no power whatever to order any costs to be paid out of the estate. I might, of course, order the Applicants to pay the costs, either here or in Chambers, or on both occasions; but I think that would be extremely unfair to them. They have brought forward two unobjectionable trustees, approved, as I have already mentioned, by a large number of beneficiaries, and, when they originally made the application, *Mary Jane Broadbent* had not completed her legal title, and was not in a position to raise the legal objections which she has now raised. Therefore it would be wrong, in my judgment, to order those Applicants to pay any costs, though, unfortunately, I must leave them to bear their own.

I cannot deal with *Mary Jane Broadbent's* costs now. I do not say that she will not be entitled to them at some future time. The order intended to be made in Chambers was that the costs should not be dealt with by that order. Unfortunately, I think, a form which I am told is a new one—it is certainly new to me—was adopted, and raised a question whether the order did not in terms say that she was not to be allowed any costs. That was

distinctly adverse to my own express view in Chambers. In now giving no costs, I wish it to be understood that I do so in the ordinary form. I make no order respecting the costs of the application: that decides nothing about them whatever. The order, therefore, will simply be that the order made in Chambers be discharged.

Solicitors: *H. Barber, Ashton-under-Lyne; Lord & Son, Ashton-under-Lyne.*

G. I. F. C.

CORBETT *v.* JONAS.

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1892
July 14.

[1891 C. 2492.]

Light—Injunction—Implied Grant—Right to Extraordinary Amount of Light.

Where the owner of land grants part of the land with a house upon it, which is to be used for business purposes, the intention to be imputed to the parties, in the absence of a special bargain, is that the house is to be granted with light sufficient for all ordinary purposes of business in the locality.

In considering the effect of such a grant, the Court must look back to the time when the contract between the parties was entered into, and cannot impute an intention that the premises should be used for a special purpose not shewn to be in the mind of either of the parties at that time.

The owners of a freehold building site in the City of *London* granted to the Plaintiffs' predecessors in title a lease of a building which had been erected by them in pursuance of a previous building agreement. The building was of considerable size, and contained several sets of rooms intended to be let for commercial purposes. At the date of the building agreement the lessors were the owners in fee of an adjacent house and land, which, subsequently to the lease, they conveyed to the Defendant. The Defendant proposed to erect upon his land a new house thirteen feet higher than the existing house; and, in order to test his right to do so, erected a screen. In an action by the present lessees, under-lessees, and occupiers of the demised building for an injunction, it appeared that the under-lessees of the ground floor were wool brokers, who used one of their rooms for the purposes of sorting and valuing samples of wool, for which a strong light was required, and that if a house of the proposed elevation were erected by the Defendant two of the windows would be so darkened that these processes could not be carried on, on the ground-floor, so advantageously as formerly, but that the premises would still be

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in the enjoyment of a good and sufficient light for all the ordinary purposes of business as commonly carried on in the City of *London*:—

Held, that the Court could not impute to the parties to the lease an intention that the demised building should be used for wool-broking purposes, or other purposes requiring an extraordinary amount of light; that all that could be reasonably deemed to have been in their contemplation was the grant of sufficient light for ordinary business purposes in the City of *London*; and that, therefore, the Plaintiffs were not entitled to an injunction.

By an agreement, in writing, dated the 29th of June, 1874, made between the *Clothworkers' Company* and *Charles Joseph Corbett* and *Thomas Newson* (both since deceased), it was agreed that upon completion of certain buildings, to be erected by *Corbett* and *Newson* at their own expense, according to plans and elevations approved by the company, upon land being the site of the Plaintiffs' house, No. 5, *Copthall Buildings*, and other neighbouring houses in the City of *London*, the company would grant to *Corbett* and *Newson* certain leases therein mentioned. The aggregate rent under the leases was £5760 a year. The lessees expended in the erection of buildings under the agreement upwards of £50,000, and the area occupied by the houses was 17,478 square feet, or thereabouts. In pursuance of the agreement, the house No. 5, *Copthall Buildings*, was in the years 1874 and 1875 erected by the lessees upon part of the land comprised in the agreement, and the house was wholly completed in or before the month of October, 1875.

On the 1st of September, 1875, a lease of No. 5, *Copthall Buildings* was, in pursuance of the agreement, granted by the company to *Corbett* and *Newson*. This lease was afterwards surrendered by the lessees to the company, and in lieu thereof a lease of the 4th of February, 1880, in identical terms except as to the rent, was granted. The surrender and new lease were made to enable the company to correct an accidental error in the rent reserved by the original lease.

By the lease of the 4th of February, 1880, made between the company of the one part, and *Corbett* and *Newson* of the other part, in consideration of the expense incurred by the lessees in the erection of the buildings thereinafter described, the company demised No. 5, *Copthall Buildings*, to the lessees for the term of

eighty years, from the 24th of June, 1874, at the yearly rent of £1250. The lease contained a covenant on the part of the lessees that they would not, without the license and consent in writing of the company, stop up, or darken, or obscure any windows or lights belonging to the demised premises, or to the buildings erected thereon, nor permit any window light easement or other encroachment to be made or enjoyed, into, upon, over, and against the demised premises, which might prejudice, or tend to prejudice, the rights of the company, and that they would in case of any attempt at such encroachment give immediate notice thereof in writing to the company, or to their clerk; and that all questions of light and air should be settled by and at the expense of the lessees, who should indemnify the company.

C. J. Corbett died in 1882, and the Plaintiffs *Elizabeth Corbett, C. H. Corbett,* and *J. Byrne,* were his surviving executors, and they and the Plaintiff *J. S. Corbett* were the present trustees of his will.

T. Newson died in 1890, and the Plaintiffs *Rebekah Newson* and *A. B. Newson* were his executors, and they and the Plaintiff *E. Carritt* were the present trustees of his will.

The Plaintiffs, Messrs. *Helmuth, Schwartze & Co.,* were wool brokers, and were the lessees and occupiers under an under-lease, dated the 17th of June, 1876, granted to them by the lessees, *Corbett* and *Newson,* for a term expiring on the 25th of March, 1893, at the annual rent of £325, of five rooms on the ground-floor, and the basement under the same rooms, part of No. 5, *Copthall Buildings.* These rooms had five windows facing north on *Great Swan Alley,* one of such windows and half of another window being directly opposite to the Defendant's house, No. 16, *Great Swan Alley.*

During the negotiations antecedent to the signing of the agreement of the 29th of June, 1874, and continuously until after the granting of the lease of the 4th of February, 1880, the company were the owners in fee simple of the house No. 16, on the side of *Great Swan Alley* opposite to No. 5, *Copthall Court,* and this house (with the exception of the screen or hoarding hereinafter mentioned) had remained unaltered in elevation from the commencement of the negotiations. Subsequently to the 4th of February,

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1880, the company sold the fee simple of the house to the Defendant.

No. 5, *Copthall Buildings* abutted on its north side upon *Great Swan Alley*, and on its east side upon *Copthall Avenue*, formerly called *Little Bell Alley*. *Great Swan Alley* led from the east side of *Moorgate Street*, near the *Bank of England*, into *Copthall Avenue*. No. 5, *Copthall Buildings* was a large structure, having five floors or storeys, including the basement, and containing about ninety sets of rooms, let to merchants, brokers, public companies, and others as offices, counting-houses, sample-rooms, and otherwise. The width of *Great Swan Alley*, between No. 5, *Copthall Buildings* and No. 16, *Great Swan Alley*, varied slightly, but was about 23 ft. 8 in. The length of No. 5, *Copthall Buildings* from east to west on the north side, next *Great Swan Alley*, was 138 feet. Its height on the north side from the pavement level to the parapet of the roof was at the east side 51 feet, and at the west end 49 feet.

The Defendant was desirous of erecting a new house upon his land to a height exceeding that of the existing house by thirteen feet, and, in order to test his right to do so, on the 3rd of July, 1891, he caused a screen or hoarding to be erected upon the parapet of the south face of his house, No. 16, *Great Swan Alley*, of the whole width of the house and thirteen feet in height. It was constructed of a wooden frame, fixed horizontally, by means of supports to the roof of the house, and was divided into fifteen panels or divisions in three lines of five each. Each panel was covered with an opaque material.

The Plaintiffs, by their statement of claim, alleged that the screen caused a substantial interference with the access of light to the Plaintiffs' windows opposite to the Defendant's house, and prevented such of the Plaintiffs as were tenants and occupants of the rooms and offices lighted by such windows from enjoying the quantity of light necessary for the reasonable user of such offices for the purposes of their respective callings; and they claimed an injunction to restrain the Defendant from erecting any screen or hoarding upon, or addition in height to, No. 16, *Great Swan Alley*, which would interfere with the reasonable enjoyment of the Plaintiffs' property, No. 5, *Copthall Buildings*, by obstructing

or lessening the access of light and air to those premises as the same were demised by the leases, or otherwise to derogate from the Plaintiffs' rights under the leases.

From the evidence given upon the hearing of the action, it appeared that one of the rooms on the ground floor was used by Messrs. *Helmuth, Schwartze & Co.*, for the purpose of sorting and valuing samples of wool, and that for this purpose a special amount of light was required. It further appeared that if a building of the proposed elevation were erected, two, if not more, of the windows in the room would be so darkened that the processes of sorting and valuing wool could not be carried on as advantageously as formerly, but that the premises would still be in the enjoyment of a good and sufficient light for all the ordinary purposes of business as commonly carried on in the City of *London*.

The other material facts of the case sufficiently appear from the judgment.

It was argued on behalf of the Defendant that the Plaintiffs took with notice of a building scheme, according to which it was intended that the Defendant's house should at some future time be pulled down and re-erected in a manner which would interfere with the light to the Plaintiffs' premises as enjoyed at the time of the demise to them, and that therefore, according to the principle of *Birmingham, Dudley, and District Banking Company* v. *Ross* (1), the Plaintiffs were not entitled to an injunction. The evidence, however, in the opinion of his Lordship, fell far short of establishing the existence of any such general building scheme, and the question, therefore, arose whether the Plaintiffs had proved the existence of such an interference with their light as would entitle them to an injunction.

Sir *H. Davey*, Q.C., and *G. A. Watson*, for the Plaintiffs, referred to *Birmingham, Dudley, and District Banking Company* v. *Ross*, and *Myers* v. *Catterson* (2), and submitted that the Plaintiffs were entitled to an injunction as claimed by them.

Renshaw, Q.C., and *A. Adams*, for the Defendant:—

The Plaintiffs have not shewn the existence of any such

(1) 38 Ch. D. 295. (2) 43 Ch. D. 470.

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material injury to or interference with their light by reason of this screen as will entitle them to an injunction. The evidence is clear that, apart from the special purpose of sorting and valuing wool, the light is good and sufficient for all ordinary purposes in the City of *London*. In order to ascertain the amount or *quantum* of light to which grantees are entitled under the doctrine of implied grant, all the circumstances which existed at the time when the grant was made must be regarded: *Myers* v. *Catterson* (1), and it must be considered what was then in the contemplation of the parties. If the Plaintiffs had shewn that at the time when the agreement for the building lease was entered into they were purposing to use any part of this building for wool-broking purposes, they might have been able to make a case; but the evidence does not shew anything of the kind.

The only authority on the subject of the right to a special or extraordinary amount of light is *Lanfranchi* v. *Mackenzie* (2), where it was held, in the case of ancient light, that in order to establish a right to the access of an extraordinary amount of light for a particular purpose or business, open, uninterrupted, and known enjoyment of such light, during the whole period of twenty years, must be shewn.

That case has been commented on in numerous cases in which the question has been raised, but it has never been overruled, as the ultimate decision in the later cases has always rested on other grounds; and it follows from that case that under the doctrine of implied grant a right to a special amount of light can only be established if it is shewn that such light was in fact enjoyed at the time of the grant. All that can be contended for, in the absence of express contract, is such a reasonable amount of light as is sufficient for all ordinary purposes for which the premises may be used.

[KEKEWICH, J., referred to *Attorney-General* v. *Queen Anne and Gardens Mansions, Limited* (3) and *Phillips* v. *Low* (4).]

Watson, in reply:—

The Court, in considering the amount of light to which a

(1) 43 Ch. D. 473, 474.
(2) Law Rep. 4 Eq. 421.
(3) 5 Times L. R. 430.
(4) [1892] 1 Ch. 47, 51.

grantee is entitled, will have regard not merely to the actual enjoyment at the time of the grant, but to the purposes for which, according to reasonable anticipation, the premises will have to be used in the future: *Moore* v. *Hall* (1); *Myers* v. *Catterson* (2). The Plaintiffs' premises are close to the *Wool Exchange*, and at the date of the lease it must have been in the reasonable anticipation of the parties that in such a locality they might be required for wool-broking or other special purposes necessitating an extraordinary amount of light.

KEKEWICH, J. (after dealing with the other point raised, and stating that in his opinion there was no evidence of any scheme of the kind referred to in *Birmingham, Dudley, and District Banking Company* v. *Ross* (3), continued as follows):—

But then I come to a part of the case which, to my mind, deserves more serious consideration. It is said that there has been no such material injury to the Plaintiffs' windows as will justify the granting of an injunction. The facts are really beyond dispute. I do not know for what purposes any of the buildings on the Plaintiffs' land were used before the erection of the present buildings. Nor would it be material that I should know, because I am dealing with entirely new buildings, erected on a new site, and it is not sought to protect the windows with reference to what occurred before; but it is sought to protect them on the doctrine that a grantor cannot derogate from his own grant by giving rights to others which interfere with the full enjoyment by the grantee. This building has been erected, and is now, so far as the ground-floor is concerned, in the possession of wool-brokers, and I have it conclusively proved that the enjoyment of two windows at least for the purpose of the wool-broking business would be interfered with by the erection of such a building as is contemplated by the Defendant. There is one small room which is not often used for sorting or valuing wool. Another room is so used, and two of the windows are useful for the purpose to which that room is devoted; and if this interference with the light takes place, I have it proved,

(1) 3 Q. B. D. 178. (2) 43 Ch. D. 470.
(3) 38 Ch. D. 295.

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and I do not think there is the slightest doubt about it, that the sorting and valuing of wool will not be effected in future with the same advantages as heretofore. On the other hand, I have it proved by testimony quite as conclusive, not forgetting that of the experienced surveyor who gave evidence on behalf of the Plaintiffs, that for ordinary purposes of business those rooms are in the enjoyment of excellent light. The small room, which has not been found of use for the wool-broking business for sorting and valuing purposes, will be useful for keeping books of account and other matters in connection with the business, and would be, as I have just been told and as I had myself anticipated, a good room for drawing and making plans. The other room is on the same footing. It would be interfered with for this special purpose, but would be useful for all the ordinary purposes of business that could be suggested. Of course there might be some other purposes, as, for example, the sampling of silk, or something that required careful observation, or minute microscopic trades where a special light is necessary. But for all ordinary purposes there is, or will be, if the proposed building is erected, a sufficient light. Those are the undisputed facts. I am invited to say that, notwithstanding this evidence, I ought to conclude that the difference between forty-five degrees and sixty degrees, taken at a critical point in the windows, must necessarily be such an interference with the light as will be material. There have been many cases in which I have not hesitated to find against all the expert witnesses where I have thought, applying my own knowledge, that there was material interference, and I should not hesitate to do so again upon a proper occasion. But here I have no evidence against the expert witnesses. The evidence of experiment to which I referred in *Myers* v. *Catterson* (1), as being far more valuable than the evidence of experience, concurs with the effect of the evidence of witnesses, and shews that this light is good for ordinary purposes, and will remain so, notwithstanding the erection of the proposed building, but that it will not be good for the special purpose to which the larger room has been devoted, if that building is erected.

(1) 43 Ch. D. 470.

I have to consider the question of law without any reference to any other or more complicated facts, and that question is one of some interest, and, so far as I am aware, free from decision; that is to say, I do not think that there is any authority which ought to conclude my decision. This is not a question of ancient lights, but of implied grant; and in *Birmingham, Dudley, and District Banking Company* v. *Ross* (1), Lord Justice *Bowen* pointed out the difference between the measure of the right in the one case and the other. He says (2): "Sir *Horace Davey* asked us to consider that the measure of this right, which in ordinary cases of a grant arose, was the same as the measure of enjoyment of ancient lights. I confess I do not at the present moment assent to that view. The extent of the right in the case of ancient lights is measured, not by what is assumed between the parties to be reasonably necessary, but by what has been in fact enjoyed"; and then a little way further on he says: "Still the measure of the right in the case of ancient lights seems to me to be different from the measure of the right which accompanies, in ordinary cases, a grant by a grantor." What is the measure of the right as regards the grantor and grantee? The grant is of a house. As was pointed out by Mr. Justice *Chitty* in the passage to which I referred during the argument in *Phillips* v. *Low* (3), "Whether the intention of both the grantor and grantee under a voluntary deed is regarded, or the intention of the grantor alone is regarded, the result is the same. The intention to be imputed is that a house with lights shall pass." Not with lights for all purposes in the world—not lights for a special purpose, unless the dealing is with a special grantee, but with lights for the ordinary purpose of light. A grant of a house in the country would certainly imply a different light from that of a house in a town. A grant to a jeweller would imply lights of a different intensity and quantity from that to a trader whose business did not require the same amount of light. But, in the present case, the grant was to architects or persons who were about to build themselves and make a title to others; so that there is no evidence of any special bargain between grantor and grantee.

(1) 38 Ch. D. 295. (2) 38 Ch. D. 313.
(3) [1892] 1 Ch. 51.

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Accordingly I start with this, that the light granted cannot be more than such a reasonable amount of light as is required for the ordinary enjoyment of the premises as granted in the immediate future, and can be reasonably anticipated as likely to be required in the more distant future. It is now, I think, settled that, in questions of light—I am, of course, referring rather to light granted than to ancient light, the right to which is acquired by long enjoyment—regard is to be had to the future, and it must be considered not only how the house or tenement is used in the present, but how, according to reasonable anticipation, it will be used henceforward. I had myself to consider that point in the case of *Attorney-General* v. *Queen Anne and Gardens Mansions, Limited* (1), in deciding which I held that I was bound by *Moore* v. *Hall* (2), and I have had occasion more than once to comment on *Moore* v. *Hall* and *Lanfranchi* v. *Mackenzie* (3), and the opinion of Mr. Justice *Field* (now Lord *Field*) in *Dalton* v. *Angus* (4). There, no doubt, that learned Judge was dealing rather with ancient lights; but he refers to *Moore* v. *Hall* and *Lanfranchi* v. *Mackenzie*, and treats the one case as consistent with the other. I ought, therefore, to look forward to a reasonable extent, and to consider that the house may be used for one purpose or another; that a house in the City of *London*, whether near the *Wool Exchange* or elsewhere, may be used for almost any purpose of business; but I cannot impute an intention, so as to make that intention part of the contract between grantor and grantee, that the light should be used for a special purpose not shewn to be in the mind of either of them at the date of the contract. I must look back to that time, and reasonably consider what was in the contemplation of their minds at that time. In cognate cases, when the Court endeavours to find out the amount of damages which ought to be paid in respect of breach of contract, there is a similar difficulty. One knows that when the contract was entered into the parties did not contemplate any amount being paid, because they considered that the contract would be performed and not broken. But still, even in that case, it is necessary to consider what, having regard to all the

(1) 5 Times L. R. 430.
(2) 3 Q. B. D. 178.
(3) Law Rep. 4 Eq. 421.
(4) 6 App. Cas. 740, 760.

surrounding circumstances, was in the reasonable contemplation of the parties. Here, what the parties had in contemplation was the erection of a building in the City of *London* to be used for business purposes; and it would be going too far to say that, because it was near the *Wool Exchange*, or in any other position, there was an intention on the part of the grantor or grantee that the premises should be used for wool-broking purposes, or other purposes requiring an extraordinary amount of light, and that therefore this extraordinary amount of light should be granted for all time. That seems to me to be going beyond anything that could be reasonably contemplated. I think that to import that into the contract of the parties would be to import something which cannot properly be deemed to have been in their contemplation, and that all that was in their contemplation was sufficient light for ordinary business purposes in the City of *London*. That light, according to the evidence, the Plaintiffs will have, notwithstanding the erection of a building, thirteen feet higher than the existing building, in the line of this screen. On that point I am against the Plaintiffs, and the action therefore fails, and must be dismissed with costs.

Solicitors for Plaintiffs: *E. W. & R. Oliver.*
Solicitor for Defendant: *Alfred Jonas.*

C. C. M. D.

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[1891 E. 179.]

Vendor and Purchaser—Restrictive Covenant—Property sold in Plots—Covenant against Building without Consent of Vendor, "his Heirs or Assigns"—Meaning of "Assigns."

About 1874, *D.*, the owner of the *B.* estate, began to offer it in plots, on conveyances and leases, as building sites. Intending purchasers and lessees were shewn, by *D.'s* agent, a form of agreement, a clause of which provided that the conveyance should contain certain restrictive covenants (to run with the land conveyed), including a covenant that the purchaser would not "without the consent in writing of *D.*, his heirs or assigns," erect any building on the land conveyed, other than that which was to be built, according to the agreement, before the conveyance was executed.

In 1874, *X.* signed an agreement for leases from *D.*, of two of the plots, *Glendorgal* and *St. Aloysius*, on each of which a house was to be built. The agreement gave *X.* the option to purchase the fee simple, and provided that the leases, and the subsequent conveyances, if any, should contain restrictive covenants, including the above covenant against further building without the consent aforesaid.

The lease of *Glendorgal* was granted to *X.*, in April, 1876, and was assigned by him to *L.*

In July, 1879, the fee simple was conveyed to *L.*, the conveyance containing (*inter alia*) a covenant against building without the consent aforesaid.

In June, 1883, *L.* conveyed *Glendorgal* to the Plaintiff, subject to the restrictive covenants.

The lease of *St. Aloysius* was granted to *X.*, in July, 1876, and in September, 1876, the fee simple was conveyed, with his concurrence, to the Defendant, the conveyance containing a covenant against building without consent, similar to that in the conveyance of *Glendorgal*.

In 1890, *D.* having died, the Defendant, with the consent in writing of his successors in title (the owners of such part of the *B.* estate as had not been conveyed in plots), erected further buildings on his land.

Some hundreds of houses had then been erected on the *B.* estate, but a large portion of it still remained, unbuilt on, in the hands of *D.'s* successors in title:—

Held, that, assuming the Plaintiff was entitled to enforce the restrictive covenant, in the Defendant's conveyance, against building, there had been no breach of such covenant; because the consent, required and obtained, was that of the owner of the *B.* estate in its popular and broad sense, and not of such owner and of all lessees and purchasers acquiring title after the date of the conveyance to the Defendant.

Semble, that the Plaintiff was not entitled to enforce the covenant.

By an indenture dated the 12th of June, 1861, the *Branksome* Estate, at *Bournemouth*, was granted to *F. Fox*, his heirs and

assigns, to such uses, and generally in such manner, as *G. Durrant*, at any time or times, and from time to time, should by deed or writing, appoint; and, in default of, and subject to such appointment, to the use of *G. Durrant* and his assigns during his life, without impeachment of waste, and, after the determination of that estate by any means in his lifetime, to the use of *F. Fox*, and his heirs, during the life of *G. Durrant*, in trust for *G. Durrant* and his assigns, with remainder to the use of *G. Durrant*, his heirs and assigns, for ever.

In or about 1874, *G. Durrant* began to offer the *Branksome* Estate, on leases and conveyances in plots, as building sites.

Intending lessees and purchasers, on applying to *G. Durrant's* agent for sites, were shewn a form of agreement, in which blanks were left for the names, dates, rents, &c., and on completion of the negociations this was filled up, such alterations being made as circumstances required, and signed.

The form of agreement contained the following clause:—

"The deed of conveyance shall contain covenants by the person or persons to whom such conveyance shall be made (to the intent that such covenant shall for ever thereafter run with the land thereby conveyed), that he or they, and his or their heirs or assigns, will perform such of the agreements hereinbefore contained as shall not then have been performed, and will pay the yearly sum of £ , towards the expense of repairing the said road, and the further sum of £ , towards the expense of repairing the said sewers, and will not, without the consent in writing of the vendor, his heirs, or assigns, enlarge the said messuage, or erect any other messuage or building upon the piece or parcel of ground thereby conveyed, nor exercise or carry on, or permit to be exercised or carried on, in or upon the said piece or parcel of ground thereby conveyed, nor exercise or carry on, or permit to be exercised or carried on, in or upon the said messuage and premises thereby conveyed, or any part thereof, any trade or business whatsoever, but will use the said messuage as a private dwelling-house only, and keep such part of the ground as shall not be built upon as ornamental garden or pleasure-ground and well planted with trees and shrubs, and will not do, or permit or suffer to be done, in or upon the said piece

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or parcel of ground, any act, matter, or thing whatsoever, which may be a nuisance, annoyance, or disturbance to the vendor, his heirs or assigns, or his or their tenants, or the neighbourhood."

On the 16th of September, 1874, *G. Durrant* entered into an agreement with *A. Davis*, a builder, which provided for the erection of a house on each of two plots of land forming part of the *Branksome* estate, and that, on completion in accordance with plans of a house on either plot, a lease of that plot for 100 years should be granted to *Davis*, at a rent therein mentioned. The form of the blank agreement was followed with variations, and clause 10 provided that every lease to be granted in pursuance of the agreement should contain covenants on the part of the lessee, his executors, administrators, and assigns, to fulfil the agreements therein contained, or such of them as should not at the time of granting the lease have been fully performed; to pay the rent, rates, and taxes; and to keep the buildings insured and painted; and that the lessee, his executors, administrators, or assigns "will not exercise or carry on, or permit to be exercised or carried on, in or upon the said messuages and premises, or any part thereof, any trade or business whatsoever, but will use the said messuages as private dwelling-houses, and keep the demised ground as ornamental garden or pleasure-ground, and well planted with trees and shrubs; and will not do anything which shall be a nuisance, annoyance, or disturbance to the occupiers of the adjoining or neighbouring ground; and also will not erect any building other than such as is or shall be specified in the said plans, nor make any alteration in the plan or elevation of the messuages and buildings thereby demised . . . without the consent in writing of the said lessor, his heirs, or assigns." Each lease was also to contain other covenants in the agreement specified. The agreement gave the lessee an option to purchase the house and land in fee simple within seven years, and, in the event of such purchase taking place, by clause 15 provided as follows:—

"The deed of conveyance shall contain covenants by the person or persons to whom such conveyance shall be made (to the intent that such covenants shall for ever thereafter run with the land thereby conveyed), that he or they, and his or their

heirs and assigns, will perform such of the agreements hereinbefore contained as shall not then have been performed, and will pay yearly one-half of the expense of repairing the said roads, and will not, without the consent in writing of the lessor, his heirs or assigns, make any alteration in the plan or elevation of the said messuages or dwelling-houses, or erect any other messuages or buildings upon the piece or parcel of ground thereby conveyed, nor exercise or carry on, or permit to be exercised or carried on, in or upon the said messuages and premises thereby conveyed, or any part thereof, any trade or business whatsoever." The rest of the clause (so far as material) followed the words of the blank agreement.

On the 15th of April, 1876, *G. Durrant* demised one of the two plots with the house thereon, then called "*Queen's Villa*," but afterwards called "*Glendorgal*," to *A. Davis*, for ninety-nine years, at a rent of £8 8s., the lease containing covenants by the lessee in accordance with the agreement, including covenants against carrying on any trade or business, for keeping the unbuilt-on land as ornamental garden ground, against committing any nuisance, annoyance, or disturbance, and against making alterations in or adding to the buildings.

The lease also repeated the provisions of the agreement of the 16th of September, 1874, as to the lessee having an option to purchase the reversion, and as to the covenants to be contained in the conveyance thereof.

On the 23rd of August, 1877, *Davis* assigned *Glendorgal* to *C. J. Lacey*, his executors, administrators, and assigns, for the residue of the term of ninety-nine years, subject to the rent and lessee's covenants aforesaid, and subject to a mortgage and further charge executed by *Davis* in favour of *R. Lucas*.

On the 6th of April, 1878, *R. Lucas* reassigned *Glendorgal* to *C. J. Lacey*, free from the mortgage and further charge.

By an indenture dated the 30th of July, 1879, *G. Durrant* appointed and conveyed *Glendorgal* to *C. J. Lacey*, his heirs and assigns, the lease containing a covenant, in the form referred to in the agreement of the 16th of September, 1874, by *C. J. Lacey*, for himself, his heirs, executors, administrators, and assigns, with *G. Durrant*, his appointees, heirs, and assigns, and also as a

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separate covenant with *F. Fox* and his heirs (to the intent that such covenant should run with the land), that (*inter alia*) *C. J. Lacey*, his heirs or assigns, would not, "without the consent in writing of the said *George Durrant*, his heirs or assigns, make any alteration in the plan or elevation of the said messuage or dwelling-house and buildings, nor erect any other messuage or building, wall, or fence upon the said piece or parcel of ground hereby conveyed."

On the 19th of May, 1883, *C. J. Lacey* agreed in writing with *W. S. Everett*, for the sale to the latter of *Glendorgal*, subject to the restrictive covenants.

By indenture dated the 27th of June, 1883, *C. J. Lacey* conveyed *Glendorgal* to *W. S. Everett* in fee, "subject nevertheless to the restrictive covenants on the part of the said vendor contained in the said indenture of the 30th of July, 1879." And *W. S. Everett* thereby covenanted with the vendor that he would at all times thereafter observe and perform all and every the covenants, stipulations, and agreements entered into by the vendor in the deed of the 30th of July, 1879, and indemnifying the vendor from all costs, damages, charges, and expenses to be sustained by breach or non-performance of such covenants.

On the 28th of July, 1876, *G. Durrant* demised the other of the above-mentioned two plots of land, with the house thereon, afterwards called *St. Aloysius*, to *A. Davis* for ninety-nine years, at the rent of £8 8*s.*, the lease containing provisions similar to those contained in the lease, dated the 15th of April, 1876, of the other plot.

On the 29th of September, 1876, *A. Davis* executed a mortgage, by sub-demise, of *St. Aloysius*, in favour of *Marianne Arden*.

By an indenture dated the 24th of March, 1877, to which *G. Durrant*, *F. Fox*, *A. Davis*, *Marianne Arden*, and *Frederic Hardy Remington* were parties, *St. Aloysius* was appointed and conveyed to *F. H. Remington*, in fee, free from the lease and mortgage. The deed contained the following clause: "And the said *Frederic Hardy Remington* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said *Frederick Fox* and his heirs, and also, as a separate covenant, with the said *George Durrant*, his appointees, heirs, and assigns,

to the intent that such covenant shall for ever hereafter run with the land hereinbefore expressed to be hereby appointed and granted, that he the said *Frederic Hardy Remington*, his heirs, or assigns . . . . shall not nor will, without the consent in writing of the said *George Durrant*, his heirs, or assigns, make any alteration in the plan or elevation of the said messuage, dwelling-house, and buildings, nor erect any other messuage, building, wall, or fence, upon the piece of land hereby assured, nor exercise or carry on, or permit to be exercised or carried on, in or upon the said messuage and premises hereby assured, or any part thereof, any trade or business whatsoever, but will use the said messuage as a private dwelling-house or lodging-house only, and keep such part of the land as shall not be built upon as ornamental garden or pleasure-ground, and well planted with trees and shrubs, and will not do or permit or suffer to be done, in or upon the said piece of land hereby assured, any act, matter, or thing whatsoever which may be a nuisance, annoyance, or disturbance to the said *George Durrant*, his heirs, or assigns, or his or their tenants or the neighbourhood."

F. H. Remington, with the consent of *G. Durrant*, and of his successors in title to the *Branksome* estate, used *St. Aloysius* as a boys' school; and in October and November, 1890, having obtained the previous consent in writing of such successors in title, the then owners of the *Branksome* estate—that is to say, of the part of the estate which remained unsold and which had passed by the will of *G. Durrant*—*F. H. Remington* erected in the rear of his premises a schoolroom, with an ante-room for hats and coats.

W. S. Everett from time to time complained of the conduct of the boys at the school, and on the 18th of February, 1891, he commenced the present action against *F. H. Remington*, claiming by his statement of claim—(1.) an injunction to restrain the Defendant, his contractors, servants, and workmen, from erecting or allowing to remain erected any building on the hereditaments or premises in contravention of the restrictive covenants in the conveyance to the Defendant; (2.) to have such buildings pulled down; (3.) an injunction to restrain the Defendant from using *St. Aloysius*, as a school or otherwise, so as to be a nuisance,

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annoyance, or disturbance within the meaning of the restrictive covenants; (4.) damages.

The Plaintiff alleged that the restrictive convenants were imposed in furtherance of a scheme under which *G. Durrant* had divided the *Branksome* estate into plots for the purpose of being let or sold for building, and which scheme, as he alleged, contemplated the imposition of certain restrictive covenants upon the lessee or purchaser of each plot for the common advantage of the lessees or owners of the whole estate; but his Lordship held, on the evidence, that there was no scheme governing the whole estate, and that there were no conditions applicable to lessees and grantees of plots generally. The Plaintiff further alleged that when *Glendorgal* was conveyed to him he had been informed and believed that restrictive covenants similar to those in the conveyance to him were binding upon the Defendant and upon all other owners of land forming part of the *Branksome* estate. At the date of the action there were some hundreds of houses built on the *Branksome* estate, also a number of shops, and several schools; but a large part of the estate remained unsold and unbuilt on, in the hands of the owners, the successors in title of *G. Durrant*, to whom it had passed on his death under his will.

The action was tried before Mr. Justice *Romer* on May 4th, 5th, 6th, 7th, and 9th.

Chadwyck Healey, Q.C., *Manby*, and *F. E. Lacey*, for the Plaintiff:—

The Plaintiff and Defendant are both bound by restrictive covenants under a building scheme with regard to the estate of which their plots form parts; and *Davis* was their common predecessor in title. The Plaintiff does not complain of the mere user of the Defendant's house and grounds as a school, but he complains that it is so carried on as to be an annoyance within the meaning of the restrictive covenants, and further, that the building of the new schoolroom is a breach of the covenant against building. The Plaintiff has never consented to this erection, and is entitled to enforce the covenant. The Defendant sets up as a defence that he previously obtained the consent in writing of the persons who are successors in title of the grantor to a

portion of the estate still remaining unsold. But that consent did not justify the erection, for neither the grantor nor his successors could release the right to sue on the covenant to the prejudice of persons, like the Plaintiff, to whom plots had been conveyed subject to the restrictive covenants: *Western* v. *Macdermot* (1).

[ROMER, J., referred to *Renals* v. *Cowlishaw* (2).]

The Plaintiff need not shew that he has sustained damage, where the erection of the building is in contravention of a covenant: *Lord Manners* v. *Johnson* (3). He does not wish to have the new building actually removed, but asks for a declaration establishing his rights under the covenant. [They also cited *Tod-Heatly* v. *Benham* (4).]

Neville, Q.C., and *Ingpen*, for the Defendant:—

No case has been shewn for an injunction in respect of nuisance or annoyance; and the delay which has taken place would, of itself, be an answer to that part of the case. The Plaintiff has no right to complain of the erection of the schoolroom, considering that the consent of the grantor's successor in title was obtained before it was commenced. The restrictive covenants were not entered into for the mutual convenience of the tenants, but for the benefit of the landlord. If the Plaintiff claims to sue as grantee from *Durrant* or his successor, the answer is that they could not give him such a right in prejudice of the Defendant's right to erect a new building with the consent mentioned in his conveyance; and the covenants do not bring the case within the rule as to the owner of two tenements, granting one with the benefit of an easement created by himself, being unable to derogate from his grant by something done with the property reserved: *Master* v *Hansard* (5); *Renals* v. *Cowlishaw*.

To be in a position to sue for a breach of such covenant as this, a plaintiff must hold the property defined, either as the original covenantee or as his assign. The present Plaintiff is certainly not the assign of the *Branksome* estate, or, expressly, of the benefit

(1) Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72.
(2) 9 Ch. D. 125; 11 Ch. D. 866.
(3) 1 Ch. D. 673.
(4) 40 Ch. D. 80.
(5) 4 Ch. D. 718.

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of the covenant, and it is not enough to say that he is the assign of a bit of the estate; otherwise grantees of parts at the other end of the estate could enforce the covenant, and no consent could be available except that of every purchaser and lessee on the estate. It is a question of fact whether the restrictive covenants are for the benefit of the vendor or for the common advantage of the several purchasers; and where the purchasers from a common vendor have not known of the existence of the covenants, that is almost conclusive to shew that the covenants were not to enure for their benefit: *Nottingham Patent Brick and Tile Company* v. *Butler* (1); *Collins* v. *Castle* (2). Here the only matter of common knowledge was the blank agreement in the hands of the landlord's agent, and it is not sufficient for the Plaintiff to shew that he knew some restrictive covenants were in existence on the *Branksome* estate. The only person whose consent was required was *Durrant*, or the person to whom he had assigned the benefit of the covenant.

[They also cited *Austerberry* v. *Corporation of Oldham* (3); *Leech* v. *Schweder* (4).]

Manby, in reply:—

There was a general building scheme, the covenants being the same except where the plots were to be used for different purposes, and, even then, the general character of the covenants was maintained.

[ROMER, J.:—There was no scheme governing the whole estate; there were no general conditions.]

It is immaterial that there are different conditions applicable to different classes of lots, such as sites for residences, churches, and shops: *Collins* v. *Castle* (5). But a particular class of covenants in respect of residential buildings is evidently meant for the benefit of purchasers *inter se*, and there is no evidence here that the covenants differed in respect of different plots. There is sufficient evidence of an intention that the purchasers should have the benefit of the covenants.

(1) 15 Q. B. D. 261, 268, 269; 16 Q. B. D. 778.
(2) 36 Ch. D. 243.
(3) 29 Ch. D. 750.
(4) Law Rep. 9 Ch. 465, n.
(5) 36 Ch. D. 243, 253, 254.

[ROMER, J.:—There is no evidence that the printed agreement was open to any one who wished to see it.]

The restriction was "obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily . . . requires and imports reciprocity of obligation": *Spicer* v. *Martin* (1).

[He also cited *Mackenzie* v. *Childers* (2); *Brown* v. *Inskip* (3); *Child* v. *Douglas* (4).]

1892. May 23. ROMER, J. (after dealing with the Plaintiff's claim for an injunction in respect of the alleged acts of nuisance, annoyance, or disturbance, irrespective of covenants, and also his claim for an injunction to restrain an alleged annoyance or disturbance within the meaning of the restrictive covenants in the Defendant's conveyance, proceeded as follows):—

I now pass to a more serious claim—that as to the Defendant's new building, as to which the Plaintiff does not allege or claim any damage, but says that he is entitled to an injunction because he can enforce restrictive covenants contained in the conveyance to the Defendant. The Plaintiff does not wish to act harshly against the Defendant, and, therefore, offers to be content with a declaration that he is entitled to a mandatory injunction, though he does not desire to compel the Defendant to pull down.

Two questions arise with reference to this claim. First, is the Plaintiff entitled to enforce the restrictive covenants against the Defendant? Secondly, supposing he is, has there been a breach of the covenant by the Defendant, it being admitted that the Defendant obtained the previous consent, in writing, to the new building, of the owner, for the time being, of the *Branksome* estate, speaking of that estate in its popular and broad sense and not as including the Plaintiff's plot?

As to the first point, I am by no means satisfied that, when the facts of this case are considered, the Plaintiff can be held entitled to enforce the covenant; but I need not decide the point, as I have come to the conclusion that the Defendant is right on the second point.

(1) 14 App. Cas. 12, 25.
(2) 43 Ch. D. 265.
(3) 1 Cab. & Ell. 231.
(4) Kay, 560.

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I cannot bring myself to the conclusion which the Plaintiff's counsel asked me to arrive at, that the phrase "the consent in writing of the said *George Durrant*, his heirs, or assigns," referred to in the deed of conveyance, extends to and requires the consent of all the lessees or purchasers acquiring plots after the date of the conveyance, as well as of the owner for the time being of the *Branksome* estate in its popular and broad sense. At the date of the conveyance in question a considerable part of the estate had been built over, and numerous houses erected and leases or conveyances of those houses executed by the owner of the estate. It could not have been intended that the word "assigns" should refer to or include these lessees or purchasers; and, indeed, I do not understand that that is contended for. It is said, however, that any subsequent lessee or purchaser of a plot is an assign, within the meaning of the term as used in the covenant, and that his consent in writing is necessary. But it would be very curious, if this were so—that the consent of every subsequent lessee or purchaser of a plot would have to be obtained, though the previous lessees or purchasers of plots need not be consulted at all. Or, to put it in another way, that the Defendant could not alter his buildings without the consent of the Plaintiff (the Plaintiff's conveyance being subsequent in date to the Defendant's), yet the Plaintiff was under no corresponding obligation to the Defendant; and that, as this large estate came to be wholly built over—and already there are several hundreds of houses built, though a large portion remains unbuilt over—the lessee or purchaser of what I may call an early plot is bound, if he wants to alter his building, to obtain the consent of all the hundreds of subsequent lessees and purchasers, whereas a purchaser of the last lot need obtain no one's consent.

In my opinion, by the term "the consent of the said *George Durrant*, his heirs, or assigns" (and it is worthy of notice that the phrase is not "and assigns"), is meant the owner for the time being of the *Branksome* estate in its popular and broad sense, and not every lessee or purchaser of a small plot, like the Plaintiff, and I think this view is confirmed by a consideration, not only of the circumstances of the estate and of the deeds of

conveyance, but also of the form of building agreement used on the estate and relied on by the Plaintiff, it being in pursuance of one of these agreements that the purchases of their plots by the Plaintiff and the Defendant, or their predecessors in title, were effected.

Cases of difficulty were suggested on behalf of the Plaintiff—as, for instance, whose consent would be necessary if the *Durrant* family had conveyed away the larger portion of the estate to one person, or had conveyed away in plots all the estate; but I need not now settle these puzzles (which would probably have to be decided by considering who, if any one, could be regarded as substantially the owner of the *Branksome* estate), for, undoubtedly, at present the *Durrant* family still retain the estate, portions of it only being built over, and those portions having been only leased or sold by the family in comparatively small plots. It follows that the action must be dismissed, and, as it wholly fails, I must dismiss it with costs.

Solicitor for the Plaintiff: *H. E. Herman*, agents for *Lacey & Son, Bournemouth.*

Solicitors for the Defendant: *Leggatt, Rubinstein & Co.*

F. E.

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[1889 M. 2822.]

Interlocutory Injunction—Restraining Sale of Shares—Dismissal of Action at Trial—Measure of Damages.

The Plaintiff, claiming certain shares as his property, obtained, on giving the usual undertaking as to damages, an interlocutory injunction restraining the shareholder and his mortgagees from parting with the shares.

Before the trial, a summons by the mortgagees, asking that the shares might be sold and the proceeds paid into Court, was successfully opposed by the Plaintiff and the shareholder. At the trial the action was dismissed:—

Held, that, in ascertaining the amount of damages under the undertaking, all the facts must be considered, including the fluctuations of the market during the continuance of the injunction; and that the amount

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payable by the Plaintiff was not the difference between the price of the shares when the action was dismissed and the highest price at which they had been quoted during that period, but the difference between the price when the injunction was granted and the price when the summons asking for a sale was issued.

ON the 8th of October, 1889, the Plaintiff, *F. W. Mansell*, commenced an action against the *British Linen Company Bank* and *Alexander Mackay*, claiming, by the indorsement on his writ of summons, against the latter, an order for execution by him of a transfer of fifty shares in the *Oceana Transvaal Land Company, Limited*, alleged to have been sold by the Plaintiff as the broker of *Mackay* at his request; and, against the *British Linen Company Bank*, an order that, on payment by the Plaintiff to the bank of what, if anything, was due to them on the deposit of the shares by way of security, the bank should deliver up to the Plaintiff the security for the shares; and in the meantime an injunction to restrain the Defendants or either of them from selling or offering for sale, transferring, or otherwise dealing in or parting with, the shares, without the Plaintiff's consent.

On the 21st of March, 1890, on the motion of the Plaintiff, and on his undertaking "to abide by any order this Court may make as to damages in case this Court should hereafter be of opinion that the Defendants or either of them shall have sustained any, by reason of this order, which the Plaintiff ought to pay," Mr. Justice *Chitty* ordered that the Defendants should be "restrained until judgment in this action, or until further order, from selling or offering for sale, transferring, or otherwise dealing in or parting with, the fifty shares," and from parting with the certificate of such shares, without the Plaintiff's consent.

The action was transferred for trial before Mr. Justice *Romer*, and was tried on the 31st of January, 1891.

By the judgment on the trial, it was ordered that the action should be dismissed with costs, and an inquiry was directed whether *Alexander Mackay* had sustained any and what damages by reason of the order of the 21st of March, 1890, having been made, and which the Plaintiff ought to pay according to his undertaking contained in the order.

In answer to the inquiry, the Chief Clerk certified that *Alexander Mackay* had sustained damage to the amount of £362 10*s.*, by reason of the order of the 21st of March, 1890.

According to the evidence before the Chief Clerk, the best price for which the fifty shares could have been sold on the day when judgment was given by Mr. Justice *Romer*, was £237 10*s.* The shares were not quoted on the official list until the 6th of June, 1890, and the highest price for which they could have been sold between that date and the 21st of March, 1890, when the interlocutory injunction was granted, was not stated in evidence. But it was in evidence that, during the period between the 6th of June, 1890, and the 31st of January, 1891, the shares reached their highest price on the 13th of June, 1890, when they could have been sold for £600.

The amount of damage assessed by the Chief Clerk (£362 10*s.*) was the difference between this sum of £600 and the £237 10*s.*, the best price on the day when judgment dismissing the action was delivered.

The Plaintiff took out a summons to vary the Chief Clerk's certificate by disallowing the £362 10*s.*, on the ground that there was no evidence of *Mackay* having sustained any damage, or, assuming there was such evidence, that the Chief Clerk had adopted the wrong principle in assessing the same.

The summons was adjourned into Court; and, on the request of Mr. Justice *Chitty*, to whose Court the action was assigned, was heard before Mr. Justice *Romer* on the 21st of November, 1891.

In the meantime, on the 9th of October, 1890, a summons was issued by the *British Linen Company Bank*, asking "for an order directing them to sell the . . . shares belonging to the Defendant *Mackay*, and to pay the net proceeds of sale into Court to the credit of this action, and also directing the Defendant *Mackay* to execute a transfer of such shares when sold," or, in the alternative, for an order directing *Mackay* to pay £300 into Court as security for the claim of the bank, and their costs, charges, and expenses of the action.

This summons was opposed by the Plaintiff and *Mackay*, with the result that no sale was directed.

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Neville, Q.C., and *Boome*, in support of the summons to vary the Chief Clerk's certificate:—

The damages assessed are speculative. It is impossible to say whether *Mackay* would or would not have sold the shares when they were at their highest quotation. The real measure of damages is the difference between the value of the property when it is arrested and its value when it is handed over. *Mackay* could have had the shares sold at any time on an application to the Court; but, having opposed an application by the bank for a sale, he cannot now be heard to say that he has always been anxious to realize. There is no authority for assessing damages on the footing adopted by the Chief Clerk.

Butcher, for the Defendant *Mackay*:—

The Chief Clerk may consider when a prudent man would have sold the shares, and that was when they reached the highest price. He assessed the damages on the only footing possible. The fluctuations in value may be considered: *Williams* v. *Archer* (1); *Williams* v. *Peel River Land and Mineral Company* (2).

The existence of the injunction amounted to a continual refusal to allow a sale.

1891. Dec. 5. ROMER, J.:—

I think the finding of the Chief Clerk in this case cannot stand.

The case is shortly this. The Plaintiff, claiming to be entitled to certain shares, obtains, on the 21st of March, 1890, an *interim* injunction, until judgment in the action, restraining the Defendants from selling the shares, and gives the usual undertaking as to damages. By the judgment at the trial of the action on the 31st of January, 1891, the Plaintiff's claim is held bad, and the injunction comes to an end; and the Defendant *Mackay*, the true owner of the shares, then claims an inquiry as to the damage he has sustained by reason of the continuance of the injunction, and that inquiry was directed. Before the Chief Clerk

(1) 5 C. B. 318. (2) 55 L. T. (N.S.) 689.

evidence was given shewing that during the continuance of the injunction the selling price of the shares fluctuated, the highest price being obtained on the 13th of June, 1890; and the Chief Clerk held, as a principle, that the measure of damages was the difference between the highest price the shares reached during the continuance of the injunction and the price at the time the injunction was dissolved, and on evidence as to what these prices were, and on substantially no other evidence, he found the damages.

Now, this is not a case where the Plaintiff is to be punished for any breach of duty, or where any extraordinary presumption is to be made against him. It is simply a case of ascertaining the real damage sustained. Now, I think it most improbable that, between the 21st of March, 1890, and the 31st of January, 1891, if the injunction had not been granted, the Defendant *Mackay* would have been so extremely fortunate as to have sold his shares exactly at the moment when they reached their highest point.

His difficulty is amply shewn by the well-known fable of the man who had to go through a pathway in a field of corn, not being able to turn back, and his duty being to cut down the highest blade of corn he passed in his journey. He passed several high blades, but did not cut them, hoping to reach a higher blade later on, and he came to the end of the path—and he cut no blade at all.

In the present case it is to be noted that there was no special evidence at all to render it probable that, but for the injunction, the highest price would have been obtained. It is a mere case of alleged presumption, and that presumption, I think, cannot fairly be made. In a case like this I think all the facts should have been looked to, and, amongst others, the price of the shares when the injunction was granted (as to which there was no evidence the Court could act upon) and the fluctuations of the market generally during the injunction.

I was asked to fix the amount of damages without referring the inquiry back to the Chief Clerk; but, on looking at the absence of proper evidence, I find it impossible satisfactorily to fix the amount, and the summons must be referred back to the

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Chief Clerk, with liberty to adduce further evidence before him, as it appears probable the Defendant was misled into not giving proper evidence by relying on the presumption which it was erroneously thought ought to be made against the Plaintiff.

I reserve the costs of this application until the result of the further inquiry before the Chief Clerk is known, or, if the parties prefer it, I will let them complete the matter and come before me directly, and I will then, with the consent of both parties, decide the question what, if any, damages are payable.

The Plaintiff did not adduce further evidence; but the Defendant *Mackay* shewed by his further evidence the fluctuations in the price of the shares between the 6th of December, 1889, and the 31st of January, 1891; that on the 21st of March, 1890, when the interlocutory injunction was granted, the shares might have been sold for £400; and that on the 16th of October, 1890, when the summons for a sale was issued, the price of the shares was £262 10*s*. The case came on for further argument on the 4th of July, 1892.

Boome (*Neville*, Q.C., with him), for the Plaintiff.

Austen-Cartmell (*Butcher*, with him), for the Defendant *Mackay*.

ROMER, J.:—

I think the proper amount of damages to be allowed is £137 10*s*., the difference between £400—the sum which the shares would have obtained if they had been sold on the 21st of March, 1890, when the injunction was granted—and £262 10*s*., the price which they would have fetched if they had been disposed of on the 9th of October, 1890, when the summons asking for a sale of the shares was issued.

Solicitors: *A. Pulbrook*; *West, King, Adams & Co.*

F. E.

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June 15, 16, 25.

[006 of 1892.]

Company — Voluntary Winding-up — Surplus Assets — Distribution among Shareholders—Shares of Unequal Amounts—Capital partly paid up—Capital paid in advance—Interest—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 109, 133, *sub-ss.* 1, 10 [*Revised Ed. Statutes, vol. xiv., pp.* 226, 231].

The original capital of a company consisted of £150,000 in £1 shares, of which only 30,000 were issued; but these were fully paid up as required by the articles of association.

By special resolutions the capital of £150,000 was afterwards divided into 30,000 shares of £1 each, and 24,000 shares of £5 each; the sum of 10*s.* per £5 share was payable on application, and a further sum of 10*s.* within three months of allotment; but the directors might receive from any £5 shareholder willing to advance the same all or any part of the moneys due on such shares beyond the sums actually called for, and on these advanced moneys interest was payable to the shareholder.

In a voluntary winding-up there was, after payment of all liabilities of the company and the costs of the liquidation, a surplus in the hands of the liquidator which showed a deficit on the total amount of called-up capital including the sums paid in advance by £5 shareholders:—

Held, that the surplus must be distributed as follows: (1.) in repayment to the £5 shareholders who had made advances beyond £1 per share of such advances with interest, not only till the winding-up, but down to the time of repayment; (2.) in payment to the £1 shareholders of 16*s.* per share, so as to put them in the position of shareholders who, like the £5 shareholders, had only paid 20 per cent. on the amount of their shares; (3) in payment to the £5 and £1 shareholders, *pro rata*, treating each £5 shareholder as if, in respect of each of his £5 shares, he were the owner of five £1 shares.

THE *Wakefield Rolling Stock Company, Limited*, was, on the 30th of November, 1872, registered under the *Companies Acts*, 1862 and 1867, as a company with limited liability, its capital of £150,000 being divided into shares of £1 each.

The articles of association provided (art. 4), that "the sum of ten shillings per share shall be paid on application, and ten shillings per share on notice of the allotment of shares"; (art 35), that "every member shall have one vote for every share"; and (art. 58) that "at the first ordinary meeting in every year the

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directors may with the sanction of the company, and in the month of August in every year they may of their own authority, declare a dividend to be paid to the members in proportion to their shares."

Only 30,000 shares of £1 each were subscribed for, but these were fully paid up.

By a special resolution, passed on the 16th of September, 1874, confirmed on the 2nd of October, 1874, and filed with the Registrar of Joint Stock Companies on the 6th of October, 1874, it was resolved "that the directors may, with the sanction of the company given in general meeting, consolidate and divide the capital of the company into shares of larger amount than its then existing shares."

By special resolutions, passed on the 19th of October, 1874, confirmed on the 6th of November, 1874, and filed on the 10th of November, 1874, it was resolved (*inter alia*)—

"1. That the fifth paragraph of the memorandum of association of the *Wakefield Rolling Stock Company, Limited*, be modified as follows: the capital of the company is £150,000, divided into 30,000 shares of £1 each, and 24,000 shares of £5 each."

"2. The fourth of the articles of association of the said company shall refer and apply only to the said 30,000 shares of £1 each."

"3. The sum of ten shillings per share shall be paid on application, and ten shillings per share within three months after notice of the allotment of each of the said 24,000 shares of £5 each."

"4. The further sums due on such last-mentioned share of £5 each may be called up by the directors at such time as they think expedient, so that no call shall exceed £1 per share, and so that not less than three calendar months shall intervene between each call."

"8. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the

member paying such sum in advance and the directors agree upon, such interest not to exceed the sum of £5 per centum per annum."

In accordance with the special resolutions, 6000 shares of £5 each were issued, on each of which £1 was paid up. No further call was made, and some of the £5 shareholders paid nothing in advance of calls under special resolution 8. Other £5 shareholders paid money in advance of calls, in some cases to the full amount necessary to pay up the shares in full; in other cases to the amount of 10s. only. Altogether a sum of £4096 10s. was paid in advance of calls in various amounts. On payment of any such sum in advance, the manager gave a written receipt for the amount "in advance of calls on shares."

Interest at £5 per cent. on the advances of calls was paid up to the 6th of May, 1885, when the directors reduced the amount of interest to £4 per cent. without consulting the shareholders, who, however, never made any objection.

No poll having ever been demanded, the question to what number of votes the different shareholders were entitled after the creation of £5 shares had not arisen.

The cheques for dividend and interest at 4 per cent. were accompanied by a circular signed by the manager of the company in the following form:—

"19th August, 1891.

"I enclose cheque for dividend and interest due to you for the half-year, ended 30th of June last, and I certify that the income tax will be paid by me to the proper officer for the receipt of taxes.

Dividend at the rate of 3% per annum on
—— Shares of £1 each .. .. ..
—— Shares of £5 each .. .. ..
Interest at 4% on calls paid in advance (less tax)

£

By special resolutions passed on the 14th of March, 1892, confirmed on the 31st of March, 1892, and filed on the 4th of April, 1892, it was resolved that the company should be wound

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up voluntarily, that two persons named should be appointed liquidators, and that the liquidators should carry out an agreement thereby confirmed. After accounting for all the moneys paid on shares, including the advances, there was a deficiency of assets of £3734 10*s.* 5*d.*; but a surplus of £36,361 19*s.* 3*d.* remained in the hands of the liquidators, as the proceeds of realization of the company's assets, after satisfying all the liabilities of the company and the costs of the liquidators.

An originating summons was issued by the liquidators, and served on persons representing each class of shareholders, asking for the determination of the questions: (1.) Upon what principles and in what shares and proportions, such surplus should be distributed as between (*a*) the holders of original £1 fully paid shares, (*b*) the holders of £5 shares who had paid £1 only called up on each share, and, (*c*) the holders of £5 shares who had paid £1 called up as agreed, and also moneys on the same shares in advance.

On the 21st of May, 1892, an order was made appointing the Respondents to the originating summons to represent the three different classes of shareholders. The originating summons was heard on the 15th and 16th of June, 1892.

H. M. Humphry, for the liquidators, stated the facts of the case.

Vernon R. Smith, for the holders of the fully paid-up £1 shares:—

The proper mode of distribution is to level down all the shareholders by paying some of them back a portion of what they have paid until they are all on an equality, and then to divide the assets amongst the shareholders *pro ratâ*. Each £5 share must be treated as five £1 shares; but, as £1 only has been paid on a £5 share, each of these five £1 shares has had paid up on it only the sum of 4*s.* To put the holders of £1 fully paid-up shares on an equality with the £5 shareholders, 16*s.* per £1 share must be paid to the £1 shareholders. The above method of distribution is in accordance with the principle laid down by the authorities. Where £25 shares had been issued, on some of which the whole amount had been paid, and on others

only £20 per share, in distributing surplus assets the holders of fully paid-up shares were held entitled to receive £5 per share before the assets were divided: *Ex parte Maude* (1). So, where the original capital consisted of ordinary shares, partly paid up, and afterwards fully paid-up preference shares were issued, in distributing assets it was held that the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded, and that, after paying debts and repaying to ordinary and preference shareholders the capital paid on their shares, the assets must be divided among all the shareholders in proportion to the number of shares held: *Birch* v. *Cropper* (2).

The interest on advanced calls by £5 shareholders is payable only until the commencement of the winding-up.

W. Baker, for the holders of £5 shares who had paid only £1 per share:—

The position of a man who has paid £1 on a £5 share is the same as that of a man who has paid £1 on a £1 share. His £1 is equal to the other man's £1. To each shareholder, whether a £5 or a £1 shareholder, the actual sum paid by him must in the first instance be repaid. Although only £1 was paid on the £5 share, the £5 shareholder was under liability in respect of the £4 per share uncalled up. The importance of liability for uncalled capital is an element to be considered in distributing surplus assets, as recognised by Lord *Herschell* in *Birch* v. *Cropper* (3). No doubt, the payments made must be equalized—not proportionately, but arithmetically—otherwise the £1 shareholders get a larger dividend than the £5 shareholders. According to *Birch* v. *Cropper*, the division must be made, not in proportion to the amounts paid on the shares, but in proportion to the shares held.

Another objection is, that the issue of the £5 shares was *ultrà vires*. Sect. 12 of the *Companies Act*, 1862, empowers a company, under special resolution, to modify its memorandum of association by increasing its capital by the issuing of new shares of such amount as it thinks expedient, or to consolidate and divide its

(1) Law Rep. 6 Ch. 51. (2) 14 App. Cas. 525.
(3) 14 App. Cas. 526, 535, 537.

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capital into shares of larger amount than its existing shares. But the special resolution confirmed on the 2nd of October, 1874, refers to a consolidation and subdivision of the whole capital into shares larger than £1 shares. By the special resolutions confirmed on the 6th of November, 1874, the company purports to do something quite different. It leaves a portion of the capital in £1 shares and divides the rest only into £5 shares.

[*Swinfen Eady*, for other £5 shareholders, referred to *In re Weymouth and Channel Islands Steam Packet Company* (1).]

With regard to the interest payable on the sums, beyond £1, paid on the £5 shares, such interest is payable under clause 8 of the special resolutions confirmed on the 6th of November, 1874. Such sums are payable in lieu of, and stand in the same position as, dividends, and are only payable up to the commencement of the winding-up.

[He also referred to *In re Bangor and Portmadoc Slate and Slab Company* (2).]

Swinfen Eady, for the holders of £5 shares on which, besides the £1 called up, further sums in advance had been paid:—

Birch v. *Cropper* (3) contains no decision as to how the assets are to be divided when the shares are of unequal amounts. There, after paying the company's debts, the capital paid on shares was repaid to the shareholders, and then what was left was divided in proportion to the shares, not according to the amounts paid on them. That system was followed, although the dividends were, according to the articles of association of the company, payable in proportion to the amounts paid up on the shares. Here, under art. 58, dividends are payable in proportion to the shares. The £5 shareholders and £1 shareholders are both entitled to be repaid £1, the common amount advanced, and the £5 shareholders are also creditors in respect of the further sums advanced by them under clause 8 of the resolutions, with interest to the date of actual repayment. Although shareholders cannot compete with creditors, they may with other shareholders, and where any share-

(1) [1891] 1 Ch. 66. (2) Law Rep. 20 Eq. 59.
(3) 14 App. Cas. 525.

holders are concerned there is no reason why interest should cease at the commencement of the winding-up: *In re Exchange Drapery Company* (1).

[He also referred to sect. 109 of the *Companies Act*, 1862].

Vernon R. Smith, in reply:—

Interest on sums beyond £1 advanced by the £5 shareholders is only payable till the commencement of the winding-up. [He also referred to *In re Anglesea Colliery Company* (2).]

1892. June 25. VAUGHAN WILLIAMS, J., delivered judgment as follows:—

In this case I am called upon to determine how a surplus of £36,361 19*s.* 3*d.*, remaining after payment of the liabilities of the company to creditors and the costs of liquidation, is to be distributed in adjusting the rights of the contributories. There has been called up capital in respect of the £1 shares to the extent of £30,000, in respect of £5 shares £6000, and there has been paid in advance of calls on £5 shares £4096 10*s.*, making a total of £40,096 10*s.*, or £3734 10*s.* 5*d.* in excess of the balance now available for distribution. A point has been made before me that the issue of the £5 shares was *ultrà vires*. I will, however, in the first instance, try and ascertain the true principle of distribution without reference to this point. There are several classes of shareholders who urge different claims in respect of this distribution. First, there are the holders of the 30,000 shares of £1 each which have been fully paid up. These shareholders say that they, having paid 100 per cent. in respect of their liabilities, have a right to have the £5 shareholders, who have paid up £1 per £5 share in respect of their shares, treated as only having paid 20 per cent. in respect of their liability, and claim, before there is any distribution of the surplus remaining after the payment of the liabilities of the company to creditors and of the costs of liquidation, to have an equalization worked out between them and the £5 shareholders by a levelling down by a repayment to them of the 80 per cent. which they have paid in excess of the percentage of liability for calls by the £5

(1) 38 Ch. D. 171. (2) Law Rep. 1 Ch. 555.

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shareholders—that is to say, by a repayment to them of 16*s.* in respect of each £1 share before any distribution of the surplus takes place. All parties are agreed that an equalization must take place before distribution; but the £5 shareholders take a different view as to the mode of equalization. They say that equalization must be an equalization of the cash payments irrespective of the nominal amount of the share and the consequent increased liability for calls, and say that, inasmuch as all the shareholders have paid the same amount in cash—viz., £1 each—no further equalization is necessary. I think that the answer to the question which of these two contentions is right depends upon the answer to another question, and that is, Are the £5 shares to be treated in the distribution as single shares or as five shares? If they are to be treated as single shares, then I think that the contention of the £5 shareholders is right, and that, the cash payment per share being equal, no further equalization is necessary. If, on the other hand, the £5 shares are to be treated in the distribution as five shares, then the £5 shareholders can only be deemed to have paid 4*s.* in respect of each of such shares, and the £1 shareholders are entitled to the recoupment which they claim. It is to be observed that this is not a company in which the dividends are to be paid on the amount paid up in calls, but in proportion to the shares held. The contention of the £5 shareholders, in effect, asks me to treat the dividends as payable on the amount paid up. It must be remembered that in a winding-up the property of the company includes the uncalled capital, and that the rights arising from unequal contributions on shares of equal amounts must be adjusted out of the property, including uncalled capital, not required to satisfy prior claims. The shares in the present case are of unequal amounts; but I think that for the purposes of distribution a £5 share must be treated as the equivalent of five £1 shares, and I gather that the £5 shares were so treated for the purpose of dividend. If they were not so treated, in my opinion they ought to have been so treated, for I think that, when it is said in art. 58 that the directors may declare a dividend to be paid to the members in proportion to their shares, the word "shares" refers to the amount and not to the number of the shares, for it cannot have been intended that a £5 shareholder

and a £1 shareholder were to receive the same dividend. There is more difficulty about art. 35, which says that every member shall have one vote for every share; but even in this case I am inclined to think that "share" must not be read, in the case of a company issuing shares of different nominal amounts, as meaning shares with a denoting number in the sense of sect. 22 of the Act of 1862. At all events, in my opinion, the £5 shares must, for the purposes of distribution, be treated, not as single shares, but as five £1 shares, or the equivalent of five £1 shares. Even if this view be not the correct view in relation to the company as a going concern, it must, in my judgment, be the correct view in relation to the company under a voluntary winding-up. Sect. 133 of 1862 provides that, under a voluntary winding-up, the property of the company, after satisfying its liabilities, shall be distributed amongst its members "according to their rights and interests in the company." For the purposes of this distribution the £5 shareholder has five times the interest of the £1 shareholder—has five shares to the one share—and I think that, as the equalization has reference only to the distribution, the shares must, for the purpose of equalization, be thus treated, and the moneys paid as calls thus allocated. I have still to deal with the point that the issue of £5 shares was *ultrà vires*. I am not quite sure that I understand the ground of this contention, but I do not think that the issue was *ultrà vires*. Even if the issue was *ultrà vires*, I do not think that the contract of membership was void, but only the conditions of share division. It would have been too late, after the winding-up, for the £5 shareholders to claim to be removed from the list of contributories. It seems to me that this view is consistent both with the expressions in the judgment in *Campbell's Case* (1), and with the decision of Mr. Justice *North* and the Court of Appeal in *In re Weymouth and Channel Islands Steam Packet Company* (2). The membership could not be denied by the company or the £5 shareholders, although it may be that the shareholders could not object to the shares being divided into £1 shares in accordance with the original memorandum of association and articles. The next question which I have to determine is, What is the position of

(1) Law Rep. 9 Ch. 1. (2) [1891] 1 Ch. 66.

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the £5 shareholders who have paid moneys in advance in excess of the £1 called up? In the first place, I think that they are entitled to be paid such advances, with interest at 4 per cent. down to the time of distribution. This, I think, comes before the repayment of the 16*s.* to the £1 shareholders. Then, so soon as the amount paid by each £5 shareholder, when allocated as if the £5 shares were five £1 shares, brings up the payment per £1 share to the amount per share down to which the shareholders have been levelled by recoupment, each £5 shareholder will be entitled to come in in his turn and share *pari passu* in the distribution. Thus, each shareholder will come in for recoupment when his grade is reached.

The costs of all parties, those of the liquidator as between solicitor and client, will be paid out of the fund.

Solicitors for the liquidators and for the £1 shareholders and £5 shareholders who had paid £1 per share: *Torr, Janeway, Gribble, Oddie, & Sinclair,* agents for *Stewart, Son, & Chalker, Wakefield.*

Solicitor for £5 shareholders who had paid £1 per share, and also further moneys in advance: *A. Scott Lawson,* agent for *H. Plews, Wakefield.*

F. E.

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July 2.

In re KRASNAPOLSKY RESTAURANT AND WINTER GARDEN COMPANY.

[0041 of 1892.]

Company—Winding-up—Right of Creditor to Compulsory Order—Probability of Advantage to Creditors from Investigation into Company's Affairs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 91 [*Revised Ed. Statutes, vol. xiv., pp.* 220, 222]—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

Apart from the *Companies (Winding-up) Act,* 1890, an unpaid creditor is, on satisfying certain conditions precedent, *primâ facie* entitled to a compulsory winding-up order; though such an order will not be made when those who oppose it shew that no possible benefit can accrue from it to the petitioning creditor.

But, since the coming into operation of the *Companies (Winding-up)*

Act, 1890, the *onus* does not lie on the petitioning creditor to shew on affidavit that there will be assets available for the unsecured creditors if a compulsory order is made. To justify the making of such an order it is sufficient to shew that an investigation under the Act into the affairs of the company is likely to turn out to the advantage of the unsecured creditors.

THE *Krasnapolsky Restaurant and Winter Garden Company, Limited*, was incorporated in July, 1890, with a capital of £200,000 divided into 20,000 shares, of which capital over £10,000 was paid up or credited as paid up.

In October, 1890, the company issued first mortgage debentures, charging its undertaking and all its present and future property, including its uncalled capital, with £50,000.

In October, 1891, the company issued a series of second mortgage debentures on the same property, but subject to the first mortgage debentures. The principal moneys secured by both series of debentures became payable immediately on a winding-up order being made.

In an action commenced on the 24th of May, 1892, by a second mortgage-debenture holder, a receiver and manager was appointed, who took possession of the property of the company, and was managing the business of the company at the date of the hearing of the petition mentioned below.

Alban Chambon, a decorator, in April, 1892, commenced an action against the company, for work done and materials supplied in connection with its restaurant and premises, to recover £2994.

On the 10th of May, 1892, *Chambon* applied, under Order XIV., r. 1 (Rules of Supreme Court, 1883), for leave to sign final judgment. The company opposed the application, and on the 20th of May, 1892, an order was made that, on payment into Court, within seven days, of £750, the company were to be at liberty to defend the action as to the whole of the £2994, but that otherwise the Plaintiff should be at liberty to sign final judgment for £750, and the company should have leave to defend the action as to the balance.

The company was unable to pay the £750 into Court, and did not deliver a defence within the time limited by the Master's order, and judgment by default for £2994 and costs was signed

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on the 31st of May, 1892; but a writ of *fieri facias*, issued in pursuance of the judgment, could not be executed on account of the possession of the receiver and manager.

An application to set aside the judgment by default was pending at the date of the hearing of the petition mentioned below. No part of the money owing to *Chambon* was paid or satisfied, and he presented a petition alleging that the company was insolvent, and asking for a compulsory winding-up order. There were, besides the debenture-holders, creditors having unsecured debts of £12,400. The secretary of the company made an affidavit that there was no property of the company of which a liquidator could take possession, and that a forced sale, or a sale of the property otherwise than as a going concern, would result in a sum being realized insufficient to pay the debenture-holders.

Rufus Isaacs, for the petitioning creditor.

Vernon, for the company:—

There being no property of the company of which a liquidator could take possession, no benefit would accrue to the Petitioner by making a winding-up order, and in such a case the Court will refuse to make an order on the petition: *In re Chapel House Colliery Company* (1).

W. F. Hamilton, for the second mortgage debenture-holders:—

I ask that the petition may be dismissed.

[VAUGHAN WILLIAMS, J., referred to *Buckley* on Companies (2).]

The Petitioner does not shew there are any assets outside the debentures, and in such a case *In re Chapel House Colliery Company* is an authority for not making a winding-up order.

[VAUGHAN WILLIAMS, J.:—In that case the debenture-holders were not the only creditors opposing the application for a winding-up order. Shareholders and unsecured creditors also opposed the petition.]

The Court, in determining whether there shall be a winding-up

(1) 24 Ch. D. 259. (2) 6th Ed. pp. 261–4.

order, will have regard to the wishes of creditors: *Companies Act*, 1862, s. 91.

Isaacs, in reply:—

In re Chapel House Colliery Company (1) does not apply, because it is not shewn here that nothing will be gained for the unsecured creditors by obtaining a winding-up order. If it is necessary for the Petitioner to shew that there will be assets, the Court will direct an inquiry at Chambers on this point, and adjourn the hearing of the petition until the inquiry has been answered: *In re Olathe Silver Mining Company* (2).

VAUGHAN WILLIAMS, J.:—

There must be a winding-up order.

As I understand the decisions, apart from the Act of 1890 it was settled law that, *primâ facie*, a creditor whose debt was unpaid and who satisfied certain conditions precedent, was entitled to an order on his petition. That is stated to be the rule, and I do not understand that the rule as to the creditor's *primâ facie* right to such an order has been altered by anything laid down in the case of *In re Chapel House Colliery Company*. It is a rule which, in its origin, had very high authority. It was laid down originally by Lord *Cranworth* (3) and was assented to by Lord *Selborne* (4). But *In re Chapel House Colliery Company* does shew that there are exceptions to the rule, and I agree that one of the exceptions is that, when those who oppose the making of a winding-up order can shew that no possible benefit can accrue to creditors from making the order, it ought not to be made; *à fortiori* is that so when persons opposing the petition shew, not only that the petitioning creditor will obtain no benefit from a winding-up order, but that a large proportion of the creditors are opposed to its being made.

I have to consider whether the opponents of this petition have made out that the petitioning creditor will get no benefit from a

(1) 24 Ch. D. 259.
(2) 27 Ch. D. 278.
(3) *Bowes* v. *Hope Life Insurance Company*, 11 H. L. C. 389.
(4) *In re Western of Canada Oil, Lands, and Works Company*, Law Rep. 17 Eq. 1.

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compulsory order, and, in my judgment, they have wholly failed to make it out.

I am not satisfied, as things stand, that there are no assets of the company beyond those which are appropriated by the mortgages of the debenture-holders. I agree with the observations of counsel that the Court ought not to rely on there being no affidavits filed in support of the petition, shewing that there will be assets. It is sufficient, in my judgment, to justify the making of a compulsory order if it is clear that there is a reasonable prospect of there being assets. It seems to me that there is a reasonable prospect.

Judgment having been obtained for £2994, an application has been made to set aside the judgment, and in the result it is to stand for £750, and the application, so far as the balance of the money alleged to be due is concerned, for the present stands over.

The company are seeking to set aside the judgment in respect of the balance alleged to be due beyond the £750. They have an interest in the matter as regards that balance, and from the position they have taken upon it, it may be inferred that they have some assets which will be protected if they are successful in their defence.

Therefore, it seems to me that those who oppose this petition have failed to shew that no money payment will result from making an order on this petition. But even if they had shewn it, that would not be enough to enable them to successfully resist the making of a compulsory order. To succeed they must shew that the company will obtain no advantage from the order if made.

If the circumstances are such as to suggest that an investigation into the circumstances of the company, under the *Companies (Winding-up) Act*, 1890, will be likely to turn out to the advantage of the unsecured creditors, that alone is a sufficient ground for making a compulsory order. In other words, if the circumstances appearing by affidavit are sufficient to shew, *primâ facie*, that an investigation into the formation or promotion of the company or the issuing of debentures or shares is required, that alone is an advantage to the unsecured creditors. They

are the persons who have the greatest interest in such an investigation being held, and I believe it was in their interest that the Legislature intervened.

This petitioning creditor expended the labour and money necessary for the creation of the very property which is the principal security of these debenture-holders. He has not been paid; and when I look into the matter I find that the debentures were issued almost immediately after the incorporation of the company. I am not told what was the consideration obtained for the debentures, and I have not been asked for time in order that it may be shewn that the debentures were given for money advanced to the company. It may be that, if that had been done, time would have been given for further investigation; but as it is, I hold the Petitioner has complied with the conditions precedent to the obtaining of a compulsory order, and that those who have opposed the petition have not shewn that no advantage will result from such an order. In my opinion, the creditor, who is entitled to be paid, may get some advantage, and I am not satisfied that this is not a case where the unsecured creditors should obtain the benefits intended for them by the Act of 1890. I shall, therefore, make the order, and allow the Petitioner his costs.

Vernon, asked that the company might be allowed their costs.

VAUGHAN WILLIAMS, J.:—

The company might have been more liberal with their information, and I shall not allow them any costs.

Solicitors: *E. S. Coulson; John Vernon, Son & Co.; Ashurst, Morris, Crisp & Co.*

F. E.

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March 19, 21.

In re CRAIGNISH.
CRAIGNISH *v.* HEWITT.

[1890 C. 259.]

Domicil — Marriage of Scotchman with Englishwoman—Domicil of Origin — Residence—Animus revertendi et manendi—Evidence—Scotch Law—Wife's Property—Jus mariti—Antenuptial Contract.

The domicil of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom.

The Plaintiff, a son of Scotch parents, his domicil of origin being Scotch, brought an action to establish his title, *jure mariti*, according to the Scotch law, to one-half of the property of his deceased wife, an English lady, alleging that during the marriage his own domicile, and consequently his wife's also, was Scotch:—

Held, upon the evidence, that the Plaintiff had, during the marriage, acquired by choice a domicil in *England*, and that the domicil so acquired continued until his wife's death.

Judgment of *Chitty*, J., dismissing the action with costs, affirmed on appeal.

Per Chitty, J.: Upon the marriage of a Scotchman with an Englishwoman upon whom property has already been settled, it is desirable that an antenuptial contract should be entered into by them confirming the wife in her rights according to the English law, so as to preclude the husband, in the event of the wife's death, from setting up any claim, *jure mariti*, to her property under the Scotch law.

Where the domicil of birth is changed during infancy by a change of domicil of the father,

Semble, that the altered domicil cannot be regarded as the infant's domicil of origin.

THIS was an action by the Plaintiff, *Ronald Macleay Laurentz Campbell*, "Baron *Craignish*," alleging himself to be a domiciled Scotchman, against the Defendants, the executors of the will of his deceased wife, *Charlotte Sophia Campbell*, "Baroness *Craignish*," claiming a declaration that his late wife was at the date of her death domiciled in *Scotland*, and that, notwithstanding anything to the contrary contained in her will and codicil, dated respectively the 26th of February and the 8th of April, 1889, he was, according to the law of *Scotland*, absolutely entitled, *jure mariti*, to one-half of her moveable estate, including one-half of a sum of £20,000 which, under a general power given to

her by the will of her deceased father, *Charles Meeking*, a domiciled Englishman, she had appointed or bequeathed to various persons other than the Plaintiff; and, if necessary, administration of her estate. The substantial question in the case was whether the Plaintiff was in fact, as he alleged himself to be, a domiciled Scotchman at the time of his wife's death; and whether, therefore, his wife had acquired a Scotch domicil so as to make her estate divisible according to the law of *Scotland*. The question rested almost entirely upon evidence of a very voluminous and complicated character, the nature of which is sufficiently stated in Mr. Justice *Chitty's* judgment.

The action came on for trial before Mr. Justice *Chitty* on the 12th of November, 1891.

Haldane, Q.C., and *Butcher*, for the Plaintiff.

Finlay, Q.C., *Byrne*, Q.C., and *Theobald*, for the Defendants.

[The following authorities were cited or referred to: *Potinger* v. *Wightman* (1); *Johnstone* v. *Beattie* (2); *Moorhouse* v. *Lord* (3); *In re Patience* (4); *Niboyet* v. *Niboyet* (5); *Udny* v. *Udny* (6); *Brown* v. *Smith* (7); *Ex parte Cunningham* (8); *In re Fowler's Trust* (9); *Bristow* v. *Warde* (10); *Urquhart* v. *Butterfield* (11); *Munro* v. *Munro* (12); *Countess of Dalhousie* v. *M'Douall* (13); *King* v. *Foxwell* (14); *Forbes* v. *Forbes* (15); *Douglas* v. *Douglas* (16).]

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The Plaintiff claims to be entitled beneficially to one-half of the property which passed under the will of his late wife, in addition to the annuity which she thereby appointed to him. She died on the 10th of April, 1889, and her will has been duly

(1) 3 Mer. 67.
(2) 10 Cl. & F. 42.
(3) 32 L. J. (Ch.) 295.
(4) 29 Ch. D. 976.
(5) 4 P. D. 1.
(6) Law Rep. 1 H. L., Sc. 441.
(7) 15 Beav. 444.
(8) 13 Q. B. D. 418.
(9) 27 Beav. 362.
(10) 2 Ves. 336.
(11) 37 Ch. D. 357.
(12) 7 Cl. & F. 842.
(13) Ibid. 817.
(14) 3 Ch. D. 518.
(15) Kay, 341.
(16) Law Rep. 12 Eq. 617.

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proved in *England*. She was a person of considerable wealth, derived under the will of her father, *Charles Mecking*. She had a life interest for her separate use in a sum of £65,000. Under a special power in her father's will she appointed to the Plaintiff an annuity of £200 a year during his life until marriage, determinable on bankruptcy or alienation, payable out of the income of part of the £65,000. Under another power, contained in a codicil to her father's will, she appointed a sum of £20,000, part of the £65,000, in favour of persons other than the Plaintiff. She also disposed of the residue of her estate, consisting of savings, and other personal estate belonging to her for her separate use, for the benefit of persons other than the Plaintiff. If the case is governed by English law only, the Plaintiff's claim must fail. According to that law his wife's will, operating by way of appointment under her testamentary powers and by way of disposal of property belonging to her for her separate use, is unquestionably valid and effectual as against the Plaintiff, her husband. But he bases his claim on two grounds—first, he alleges that during the marriage his own domicil, and consequently his wife's domicil, was Scotch; and, secondly, that, according to the law of *Scotland*, he is entitled beneficially to one-half of the £20,000 which she appointed, and one-half of her residuary estate. It was arranged by counsel that the question of domicil should be first decided; that if the decision should be in favour of the Plaintiff, this Court should send a case to the Scotch Courts for their opinion on the points of Scotch law; and that, if the opinion of the Scotch Courts should be in favour of the Plaintiff, the question whether the Plaintiff can at the same time set up his claim in virtue of his alleged marital right adversely to his wife's will and his claim to the annuity under her will—or, in other words, the question of election (which is a question of English law)—should be subsequently argued and decided in this Court. A prospect of prolonged and expensive litigation is thus opened up. If I am rightly informed as to the law of *Scotland*, all these questions might have been set at rest by the intended husband and wife entering into an antenuptial contract confirming her in her rights according to English law. But there was no such con-

tract. Many an English lawyer would, I think, have considered that any such contract was unnecessary, and that the wife was, as to the enjoyment and disposal of the settled property, completely protected by the provisions of the father's will and codicil against any claim on the husband's part. This case, whatever the result may be, will serve to put advisers of English ladies on their guard against the possibility of such claims. It cannot, however, be imputed to the Plaintiff that he kept back his claim; he had no thought of Scotch domicil or Scotch law until, as he said in his evidence, he had a conversation with "a barrister friend," the result of which was the issue of the writ on the next morning. In order to establish that his own domicil was Scotch, the Plaintiff gave evidence as to the domicil of his great-grandfather and his grandfather. When this evidence, chiefly documentary, had been put in, it was admitted by the Defendants' counsel that the Plaintiff had proved that the domicil of both these ancestors was and continued until their deaths to be Scotch; consequently, the Plaintiff's father, being the legitimate son of a man domiciled in *Scotland*, had at his birth a Scotch domicil. The contest then starts from this point. In the course of it many questions were raised, some of law, and some of fact, including the just inferences to be drawn from the facts proved. In view of the conclusion at which I have arrived on the facts subsequent to the Plaintiff's marriage with Miss *Meeking*, I shall pass by many of the questions that were raised; I shall begin with a short statement of the facts from the Plaintiff's birth down to that marriage. He was born on the 24th of December, 1836, at *Sydney*, in *New South Wales*. His father was then an officer in the 21st Regiment, serving with his regiment stationed there. His father and mother had married in that colony in 1834. His mother was the daughter of Sir *Alexander Macleay*, Speaker to the Legislative Council at *Sydney*. On the 15th of December, 1837, the Plaintiff's father retired from the army by sale of his commission. He remained in the colony for some few years afterwards. He became police magistrate at *Parramatta*, and subsequently, about 1838 or 1839, Colonial Treasurer. He gave up his appointment and left the colony about 1841. In that year he arrived in *England* with his

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wife and family, including the Plaintiff. He subsequently visited *Scotland*, and, after a short stay in *Manchester*, he came with his wife and family to *London* in 1846, and continued to reside there until his death. In August, 1846, he was appointed secretary to the *London and South-Western Railway Company*. The salary was considerable and sufficient for the support of his family and himself. He became a member of the *Junior United Service Club*. In February, 1848, he purchased 62, *Chester Square*, for the remainder of a long lease, and went to reside there with his wife and family, and he continued to reside there with them until his death, which occurred on the 4th of October, 1848. Being in ill-health he had resigned his office of secretary in the previous September. He made his will on the 28th of that month, describing himself as of 62, *Chester Square*, in the county of *Middlesex*. The residue of his property remaining after payment of his debts amounted only to a few hundred pounds, which he bequeathed to his wife. He had lost his money by the failure of the *Western Bank of Australia*, as he learnt on his arrival in *England* in 1841.

Upon these facts it was argued for the Defendants—first, that the Plaintiff's father was at the time of the Plaintiff's birth domiciled in *New South Wales*, and consequently that the Plaintiff's domicil of birth was in that country; and, secondly, that if the Plaintiff's father was not then domiciled in *New South Wales*, he was domiciled in *England* at the time of his death, and thereupon it was argued for the Defendants, as a proposition of law, that domicil of origin, rightly understood, does not mean domicil at birth; but the last domicil imposed by the choice of the father, or other the guardian of an infant, who has authority to change the domicil of an infant by changing his own. This proposition of law was also raised in reference to certain facts (which I have not noticed) relating to the Plaintiff's father while under age. It was urged that great inconvenience and hardship would arise by holding that domicil of origin meant simply domicil at birth, and a case was put by way of illustration. Suppose, it was said, that at the time of the birth of his child an Englishman is domiciled in *France*, that shortly afterwards, say within three months of the birth of the

child, the father breaks up his home in *France* and returns to *England*, his own domicil of origin, and continues to live settled there until the child comes of age—it was urged that it would be a great hardship on this English child to hold that throughout the rest of his life there was clinging to him a French domicil ready to arise whenever he abandoned the English domicil, or any subsequent domicil acquired by his own choice. But this case can be met by a parallel counter-case. Suppose an Englishman domiciled in *England* at his child's birth retains his English domicil until say within three months of the child's coming of age, and then breaks up his English home and acquires a domicil in *France*, which he retains until the child comes of age—according to the argument for the Defendants the domicil of origin of this English child would be French. But inasmuch as I intend to decide this case on the assumption that the Plaintiff's domicil of origin was Scotch, I pass by these questions of fact and law without expressing any opinion upon them, except by saying, as to the Defendants' proposition of law, that I am not persuaded that it is well founded, or that it can be supported upon a due examination of the authorities bearing on the subject.

The Plaintiff was in his 12th year at his father's death. He was educated for the military service, chiefly in *England*, but partly in *Germany*, where his mother was residing. He obtained a military cadetship in the service of the *East India Company*, went out to *India*, and was appointed in 1854 to the 7th Bombay Native Infantry, one of the company's regiments. He remained in the company's service until the government of *India* was transferred to the Crown by the Act passed in 1858. He then became a military officer under the Crown. In 1869 he finally left *India*, and in 1871 he retired from military service on a pension. From 1854 to 1869 he was constantly in active service. He served in the Persian and other wars, and in the Mutiny he was an officer in *Jacob's Horse*. On his quitting *India* finally in 1869, he abandoned the Anglo-Indian domicil which he had acquired; thereupon his domicil of origin, which I assume to be Scotch, revived, and this domicil continued unless and until he acquired a new domicil by choice. The burden of proving

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that he acquired a new domicil by choice is upon the Defendants. From 1869 to 1883 his career may be briefly stated. During this period *London* seems to have been his headquarters. From *London* he generally started, and to *London* he generally returned on and after his numerous expeditions. He was continually moving from place to place. Down to 1877 his movements were principally in the direction where there was war or rumour of war. He was the military correspondent of a leading *London* newspaper—the *Standard*—during the Franco-German war; afterwards he was roving correspondent for that newspaper. He was called back to *England* by the *Standard*, and acted as military correspondent for that paper at the manœuvres on *Salisbury Plain* in 1872. He was present in the Spanish war in 1873, as correspondent for an English newspaper called the *Hour*, which had but a brief existence. I pass by the disturbances in *Bosnia* and *Herzegovina* in 1875, the Servian war in 1876, the Turkish war in 1877, and the siege of *Batoum* in the same year, in all of which he played some part, or had some concern. After 1877 his expeditions in connection with war appear to have ceased. In 1878 he was at *Milan* and *Paris*, and then he came to *London*; and thence he went on a visit to *Scotland* and *Ireland*. In May, 1879, he was divorced from his first wife at her suit by the decree of the High Court in *London*, made absolute in the following December. He had married her in 1862 while in *India*. In 1879 he was living on the banks of the river *Thames*, not far from *London*. In 1881 he travelled to *Sydney*, his birthplace, and returned to *London* about the end of that year. In 1882 he received from the Duke of *Saxe-Coburg-Gotha* the dignity of *Baron von Craignish*, and in 1883 he obtained the Royal license to use that title in this country. It is said, however, that his claim to use the title is not recognised in *Scotland*. The selection of *Craignish* for his title has apparently given great offence to an elder branch of the *Campbell* family in *Scotland*. The estate of *Craignish* in *Scotland* has passed away from the *Campbells*. The Plaintiff is not a *Campbell* of *Craignish*. His family is *Campbell* of *Laggan Lochan*. Neither the Plaintiff nor his father ever held any land in *Scotland*. I have mentioned this circumstance as to the grant of the dignity by a foreign Prince

because the Plaintiff's counsel placed some reliance on it; but it appears to me to have no bearing on the question of domicil.

I now come to the critical period which extends from his marriage with Miss *Meeking* until her death. The marriage took place at the British Embassy in *Paris* on the 26th of March, 1883. He was then in his 47th year—a time of life when a man is less disposed to rove and more inclined to settle down, particularly when he has married a rich wife. He is described in the marriage certificate as "of the parish of *Sydney*, in the county of *New South Wales*, then residing at *Parr's Hotel, Brighton*," and she is described as "of the parish of *St. Andrew's, Holborn*, in the county of *Middlesex*." They seem to have started from *London* for the marriage in *Paris*. After the marriage they went on a trip to *Nice*, and from *Nice* they returned to *London*. There they stayed at *Fisher's Hotel, Clifford Street*. That was in the middle of 1883. He bought a yacht at *Cowes*, which his wife paid for and presented to him. The yacht was, and continued to be, stationed at *Cowes*. His property consisted of his pension and some articles of ornament or the like, which he had apparently collected in his wanderings. He had no other property except the yacht. During the yachting seasons of the years 1883, 1884, and 1885, the yacht was used by him, sometimes with and sometimes without his wife, for various trips to *Scotland*, the *Mediterranean*, and the *Baltic*. During the same period they made visits to the *Riviera, Paris*, and *Boulogne, Germany*, and the *New Forest* in *England*, generally, but not always, together. There was some little confusion in the Plaintiff's evidence as to the dates and order of these trips and visits; but the exact dates and order are not material. During this period the Plaintiff and his wife were frequently in *London*, staying at hotels and furnished rooms. Whatever expeditions they made, the Plaintiff and his wife (as he stated in his evidence) always came back to *London*. On the 4th of January, 1886, the Plaintiff signed an agreement for taking No. 25, *Albert Gate*, on a tenancy commencing on the 15th of that month. He entered into possession accordingly, and resided there with his wife until their separation, which took place in June or July following. The Plaintiff, in his evidence, seemed desirous of ascribing the taking of this house solely to

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his wife; he had apparently forgotten that he had himself signed the agreement, and that in a letter written by him to her after the separation, dated *Piccadilly*, he had spoken of the house emphatically as "my house." The taking of this house was his own act, even if he took it at the request of his wife. The house was taken with the furniture therein. His wife had furniture stored at a repository: some of this was removed to the house, but the bulk remained at the repository. The articles which belonged to him were removed to the house. In the agreement he is described as of the *Junior United Service Club, S.W.* The rent was £500 a year, and the term was for a year certain, with an option to the Plaintiff to continue the tenancy for another year, and if the house was not required by the landlord, then for a further term. Some time after the separation of the Plaintiff and his wife this house was given up. After their separation they never lived together again. There were protracted negotiations carried on by their solicitors for a deed of separation. They were broken off before her death, because the Plaintiff would not accept the conditions on which it was proposed on her part that an annuity should be settled on him. Her proposal was that the annuity should be a personal provision for his maintenance, and therefore determinable on bankruptcy or alienation; the Plaintiff required that the annuity should be free of all restrictions, so that he could deal with it and raise money upon it. These negotiations were conducted throughout on the footing or tacit assumption that the law applicable to the relation of the parties was the law of *England*. The draft which passed between the solicitors was in English form; no suggestion was made from beginning to end by or on behalf of the Plaintiff of a Scotch domicil, or that the law of *Scotland* had any bearing on the rights of the Plaintiff and his wife. But, in justice to the Plaintiff, it is proper to add that he was not designedly suppressing or keeping back any claim. He was not aware that he had any before the memorable conversation with his barrister friend after his wife's death. Still, the circumstance that these negotiations were conducted on the footing or assumption that the law of *England* applied has some bearing on the question of domicil. The object of the law in searching for and ascertaining

a man's domicil is to ascertain the particular municipal law by which his private rights are regulated and defined. The circumstance that a foreigner residing in *England* by his conduct adopts the law of *England* as the law whereby his private rights are defined is relevant evidence on the question of his domicil: *Doucet* v. *Geoghegan* (1). The assumption in these negotiations, that the relative rights of the Plaintiff and his wife were governed by the law of *England*, falls far short of an intentional adoption of that law, and if it stood alone it would be of trifling import, but, taken in connection with the other circumstances of the case, it is not altogether without weight. A few more facts remain to be noticed. The Plaintiff was during the marriage a member of three clubs in *London*—the *Junior United Service Club*, the *Royal Thames Yacht Club*, and the *Raleigh*. Shortly after his wife's death he became a member of the *Arts and Letters Club*, also in *London*. His wife was a member of the *Albemarle Club* in *London*. He never had a club in *Scotland*. After the separation he continued to reside chiefly in *London*. He had lodgings or furnished apartments in *Suffolk Street*, in *Bedford Gardens*, *Kensington* (where he stayed about a year), in *Vauxhall Bridge Road*, and in *Cheniston Gardens*, where he was when his wife died. He had a studio in *Cheniston Gardens*. He made a short expedition to *Cairo*, and he went round *Scotland* in the *Norham Castle*, accompanying the ocean yacht race of 1887 as one of the *Thames Yacht Club* committee. This was the only visit, if it can be called a visit, which he paid to *Scotland* after the separation. In order to shew that his domicil was Scotch, or, at all events, that it was not English, the Plaintiff gave in evidence conversations which he had with his wife concerning *Craignish*. All these conversations occurred before he took No. 25, *Albert Gate*. The final conversation was at *Fisher's Hotel*, *London*. The Plaintiff said his wife often talked to him about the possibility of his being able to buy *Craignish*. A friend had made inquiries and reported the result. The owner evidently did not intend to part with it at any price. He put a fancy price upon it; according to the Plaintiff's recollection it was £80,000. To use the Plaintiff's own expression, "That settled

(1) 9 Ch. D. 441.

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the matter of *Craignish.*" It put an end to all ideas of his wife buying it. He never had any idea of purchasing it himself; as he truly stated, he had no money. It never really was within the range of practicability that even his wife should buy it. The £65,000 was so tied up that she could not dispose of any part of the capital during her life. She had a legacy of some thousand pounds under her father's will, but there was no evidence to shew how much of this remained in her hands at the marriage. That a man with Scottish blood in his veins should have dreams of *Scotland* and an ancestral estate there is natural enough. This was but a waking dream, and the dream, such as it was, was the dream of his wife, and not of himself. A dream or a mere hope or a wish for the impossible is not an intention. There was no intention to buy *Craignish.* Whatever idea there was on the subject, it had finally vanished before the Plaintiff took the house at *Albert Gate.* The Plaintiff gave also some evidence as to his wife's making inquiries in regard to some other places in *Scotland* on their visits to that country, but nothing came of these inquiries, and these matters all came to an end before the house at *Albert Gate* was taken.

There is one peculiarity in this case which does not often arise in questions of domicil. Generally the inquiry relates to the domicil of a person who is dead. In this case the question relates to the domicil of the Plaintiff, a living person. He gave evidence as to his past intention during his wife's life. Asked by his own counsel whether he formed any intention to make a settled home in *England,* he said, "No," and subsequently he said: "The only place I ever had any serious intention of making a home, if I could, was *Scotland.*" In cross-examination he had admitted that there was no part of the *United Kingdom* where he had anything which could be called a home but in *London*; that any home he had was in *London*; and that certainly he had no other home but in *London.* As to the evidence of the Plaintiff himself on the subject of his past intention, it must be accepted with a very considerable reserve. A Plaintiff has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of his past intention, and not merely of past declarations of

intention. (See the observations of Lord *Cairns* in *Bell* v. *Kennedy* (1).) Considerable light is thrown on the question whether the Plaintiff did not himself consider that his home was in *England* by some of his own letters written to his wife after the separation. In these letters, written at various dates and from various places, the term "home" occurs seven times. I refrain from quoting at length the passages in the letters or the cross-examination upon them. They are, so far as they go, contemporaneous declarations of intention. The term "home" may be, and is, often used in different senses. An Englishman permanently settled in one of the English colonies may without impropriety speak of going home when he is paying a visit to *England*. If asked to explain himself, he would probably say that he used the term in reference to the mother country from which he and his brother colonists had emigrated or originally sprung, and that his own true home was in the colony. So in familiar conversation or in familiar letters the term may be used in a sense (varying more or less according to the accuracy of the speaker or writer from the ordinary popular sense) of the place where a man has his abode or is settled. When a traveller speaks of returning home he uses the term in the ordinary popular sense. In a letter of the Plaintiff's (January 23, 1888), written from *Corfu*, where the Plaintiff charges his wife with "breaking up our home," he was referring to their home at *Albert Gate*. This he admitted. In a passage in the same letter, where he asks "How can I go home?" he is referring to *London*, or at all events to *England*. In an undated letter from *Alexandria*, where the term "home" occurs three times, he uses it in the same sense of *London* or *England*. In the course of his examination-in-chief the Plaintiff used the term "home" eight times, generally, however, following the lead of his counsel. When he is speaking of home before he finally quitted *India*, it is clear that he is using the term in the loose sense in which an Anglo-Indian may speak of this country as his home. After he left *India*, he uses it generally in reference to *England* as the place from which he started and to which he returned.

I have surveyed the evidence at some length. In the result

(1) Law Rep. 1 H. L., Sc. 307, 313.

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and on the assumption that the Plaintiff's domicil of origin was Scotch, I find that the Plaintiff acquired by choice a domicil in *England* from the time when he went to reside with his wife in the house at *Albert Gate*, and that the domicil thus acquired was not afterwards abandoned, but continued to the death of his wife. The evidence of the fact of residence here is amply sufficient. The true inference to be drawn from the evidence of the circumstances surrounding and accompanying the fact of the residence here, when taken in connection with the Plaintiff's own letters and the other facts of the case viewed as a whole, appears to me to be that the Plaintiff formed the intention of residing here indefinitely. There was the *animus revertendi* and *manendi*. According to *Story's* definition, that place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom: *Story's* Conflict of Laws (1). There was no present intention on the Plaintiff's part to remove from *London*. *London*, which was at first merely his head-quarters, afterwards became his home; he treated it as his home, and called it his home; more particularly he considered the house at *Albert Gate*, where he lived with his wife, as his home. A man may be in fact homeless, but he cannot in law be without a domicil. Subject to this distinction the term "home," in its ordinary popular sense, is practically identical with the legal idea of domicil: *Dicey* on Domicil (2). Living in lodgings and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicil; they are not inconsistent with domicil. There are many foreigners resident and domiciled in this country who pass their lives in lodgings only; a man may be domiciled in a country without having a fixed habitation in some particular spot in that country. The Plaintiff's lodgings or apartments were all within the area of *London*. If (as I think was the case) the Plaintiff's domicil was English in January, 1886, there is no sufficient evidence to shew subsequent abandonment of that domicil. The subsequent breaking up of the house at *Albert Gate* is attributed by the Plaintiff to his wife; even if it were his own act it would not of itself constitute an abandonment of a home or domicil in

(1) Sect. 43. (2) Pages 42–55.

England. For the period of two-and-a-half years which elapsed between the separation and his wife's death the Plaintiff's principal place of residence was in *London*; he quitted *London* only for the temporary purpose of his short trips abroad. The Plaintiff's counsel relied on the decision in *In re Patience* (1). On a question of fact a decision in a previous case affords little or no assistance. In that case I thought there was not sufficient evidence of intention. In this case I think there is. The action is dismissed with costs.

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The Plaintiff appealed. The appeal was heard on the 19th and 21st of March, 1892.

Haldane, Q.C., *Butcher*, and *Lawrie*, for the Plaintiff-Appellant, cited *Udny* v. *Udny* (2); *Whicker* v. *Hume* (3); *Moorhouse* v. *Lord* (4); *In re Patience*; and *Dicey* on Domicil (5).

Byrne, Q.C., and *Theobald*, for the Defendants, were not called upon.

LINDLEY, L.J., in delivering judgment, went through the facts of the case, and expressed the opinion that the Plaintiff had not a Scotch domicil at the time of his wife's death. His Lordship accordingly held that the decision of Mr. Justice *Chitty* was right, and that the appeal must be dismissed with costs.

BOWEN and KAY, L.JJ., concurred.

Solicitors: *Deacon, Gibson, & Medcalf; Pontifex, Hewitt, & Pitt.*

(1) 29 Ch. D. 976.
(2) Law Rep. 1 H. L., Sc. 441.
(3) 7 H. L. C. 124, 159.
(4) 32 L. J. (Ch.) 295.
(5) Page 53.

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May 30.

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Lunacy—Petition for Inquiry—Pending Proceedings—Private Examination of alleged Lunatic under Order of Court by Medical Practitioner—Report to Petitioner's Solicitors—Right of alleged Lunatic to see Report—Proof of Witness to be called—Lunacy Act, 1890 (53 *&* 54 *Vict.* c. 5), s. 94—*Lunacy Act,* 1891 (54 *&* 55 *Vict.* c. 65), s. 26, *sub-s.* 2.

While evidence was being taken during an inquiry into the state of mind of an alleged lunatic, an order was made under sect. 26, sub-sect. 2, of the *Lunacy Act,* 1891, at the instance of the Petitioner, that the alleged lunatic should attend to be examined by a medical practitioner, whose evidence was to be used at the hearing. The interview took place in private, and the medical practitioner stated the result of his examination in the form of a letter addressed to the solicitors of the Petitioner:—

Held, (1.) that under sect. 26 of the Act of 1891 there was no obligation on the medical practitioner to make any report whatever; and (2.) that the report which he did make was in the nature of the proof of a witness to be called upon behalf of the Petitioner at the hearing, and that the Respondent was not entitled to see or to have a copy of it before the trial of the inquiry.

If the medical practitioner had been so appointed as to occupy the position of an officer of the Court, or in order to report to the Court, then his report ought not to be produced to either party before the trial without the leave of the Court.

AN inquisition as to the state of mind of a lady was directed upon the petition of her husband, who was living apart from her. During the pendency of the inquisition, and while evidence was being taken therein, an order was made by the Master, at the instance of the Petitioner, under the *Lunacy Act,* 1891, s. 26, sub-s. 2, that the alleged lunatic should attend at a certain time and place to be examined by a medical practitioner, Dr. *Maudsley.* The alleged lunatic at first refused to attend, but ultimately attended in compliance with the order. The interview between the alleged lunatic and Dr. *Maudsley* took place in private, without the attendance of the solicitors on either side, and Dr. *Maudsley* stated the result of his examination in the form of a letter, which he addressed and sent to the Petitioner's solicitors without making any communication upon the subject to the alleged lunatic. Her solicitors applied for a copy of this

report; and the solicitors of the Petitioner replied that the report was in the nature of a proof of a witness for the Petitioner, and was not a document which the Respondent had any right to see, or to a copy of which she was entitled; and they said further, that they considered themselves bound to call Dr. *Maudsley* as a witness for examination and cross-examination in the ordinary course at the hearing of the inquisition.

A summons was taken out on behalf of the alleged lunatic for an order that the report should be filed or a copy of it furnished within four days.

The Master (Mr. *Maclean*, Q.C.) refused the application, and the alleged lunatic appealed.

The effect of the material enactments of the *Lunacy Acts* is as follows:—

The *Lunacy Act*, 1890, after providing, in sect. 94, sub-sect. 1, for the trial of certain issues, with a jury, in the High Court, provides, in sub-sect. 2, that "on the trial of every such issue the alleged lunatic shall, if he is within the jurisdiction, be examined before the evidence is taken, and at the close of the proceedings, before the jury consult as to their verdict, unless the judge who tries the issue otherwise directs; and such examinations shall take place either in open Court or in private as such Judge directs." The *Lunacy Act*, 1891, enacts, in sect. 26, sub-sect. 1, that the provisions of sect. 94, sub-sect. 2, of the *Lunacy Act* of 1890, "shall extend to all inquisitions, and the Masters may, for the purpose of inquisitions held before them, exercise the powers by that sub-section conferred upon the Judge who tries the issue"; and in sub-sect. 2, that "the Masters may make orders for the attendance of an alleged lunatic at such time and place as the order directs, for examination by the Master or a medical practitioner, and such order may be enforced in the same way as an order of the High Court."

Costelloe, for the alleged lunatic, in support of the appeal:—

In principle, the medical practitioner who examines the alleged lunatic under the order made by the Master becomes an officer of the Court, and must be regarded as a neutral person; and anyhow his position widely differs from that of an *ex parte*

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expert witness. Where the powers of the executive are used to compel the attendance of a subject for the purpose of examination and the obtaining of evidence, the evidence so obtained ought to be *in medio*, and in common fairness should be shewn to the person who has attended. The proceedings in lunacy are taken, not for the benefit of the Petitioner, but in the interest of the alleged lunatic, who ought not to be treated by the Petitioner as a hostile litigant. If Dr. *Maudsley* is to be called at the hearing, why should he be called under circumstances which may place the alleged lunatic at a disadvantage?

[BOWEN, L.J.:—Counsel for the Petitioner is bound to conduct his case as he would upon criminal procedure, and it would be his duty not to keep anything back from the Court.]

If there is nothing in the report against the alleged lunatic, why should the Petitioner refuse to produce it? And if there is anything in it against his case, he ought to disclose it to us *ex debito justitiæ*.

Lyttelton, for the Petitioner, was not called upon.

LINDLEY, L.J.:—

This is an application on behalf of a lady, alleged to be a lunatic, to compel the Petitioner to produce before the inquisition is held what is really a proof of evidence to be given on behalf of the Petitioner. The report of Dr. *Maudsley* is not evidence. If it had been sent by him to the Court it would have been confidential. He will be called as a witness upon the inquisition, and then he will give evidence as to the state of mind of the lady when he saw her. Probably the report will come out at some time or other; but there is nothing in principle, in the Act or the Rules, to entitle the alleged lunatic to see it before the trial. It is said that she attended and was examined under the compulsion of the Court. Lord Justice *Kay* has explained how that was. She formerly declined to see any medical practitioner, either in her own interest or at the request of her relations. An order was made for her attendance, and she went to be examined to avoid imprisonment. I think the ends of

justice will be satisfied when Dr. *Maudsley* is cross-examined upon his evidence given upon the inquisition. The application fails, and must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The question has arisen under a proceeding under sect. 26, sub-sect. 2, of the *Lunacy Act*, 1891. It was obviously in the interest of alleged lunatics, and in the interest also of justice, for the Court to have power to make an alleged lunatic attend to be examined by a person qualified to give an opinion as to his state of mind. It is in his interest that he should be examined either by the Master or by a medical practitioner, and sect. 26, sub-sect. 2, was passed for that purpose. The sub-section does not say, or seem to contemplate, that the examination must be by a doctor necessarily occupying the position of an officer of the Court, or by one bound to report to the Court. The order made for the attendance of the alleged lunatic is quite general in its terms, its object being that the alleged lunatic should be seen and should undergo examination by some proper person. It might be by a medical practitioner appointed to report to the Court, or the section might be used, as it has been in the present case, to compel the attendance of the alleged lunatic before a medical practitioner who will see him in the interest of the Petitioner, and with a view to being called as a witness by him. It is said that whatever the medical practitioner reports to the solicitor of the Petitioner who employs him, he ought to communicate to the other side. If he were an officer of the Court, he would, of course, have to report to us, and not to either side, or to one side only. But it is not so if he makes his examination for the purpose of giving evidence as a witness. There is nothing in the section to compel him to make any report at all, or to shew that if he does make a report it is to be produced. He might keep his opinion to himself. It is said that in the present case he has chosen to put his opinion into writing, that it is to the interest of the alleged lunatic to see it, and that she ought to have an opportunity of doing so. If it is in the character of a mere proof, she has no more right to see it than any other person, against whose *status* proceedings

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are being taken, has to see the proofs of the evidence to be given against him. The contents of the proofs of the witnesses in ordinary criminal cases are not as a rule communicated to the accused. The substance is usually communicated to the other side, but not the proof itself. It is said that the alleged lunatic ought to see this report, lest peradventure the counsel for the Petitioner should keep back something, in putting his questions to the doctor, which it would be for the interest of the alleged lunatic that the Court should know. We all protest most strongly against this view of a counsel's duty in such a case as this. Counsel in proceedings against an alleged lunatic is in a position similar to that of counsel for the prosecution. He is bound to recollect that he himself is an officer of justice, that it is not his duty to keep back anything, but that it is his duty to compel the production before the Court of everything that is likely to tell in favour of the lunatic. As in a criminal case, he is bound to see that everything is put before the Court which it is reasonable and proper that it should have before it in the interest of the alleged lunatic as well as of the Petitioner.

But, whatever counsel's duty may be, the other side has no right to see his proofs. A proof is never given in answer to a demand for it. A witness' proof is seldom taken in such clear terms or in such form as it should be. The persons who take it are fallible; it is usually taken by a solicitor, or a solicitor's clerk, who is not so well versed in the examination of witnesses as counsel are; and where the witness has put it into writing himself it is, perhaps, still less likely to be in accurate form; so that it might be extremely unfair to produce such a version of the evidence. What Dr. *Maudsley* has written may be material to be seen at the inquisition provided that it relates to the state of mind of the alleged lunatic, but it is a matter of justice in the absence of special circumstances that it should not be prematurely handed over.

KAY, L.J.:—

I adjourned this case into Court, as it was the first instance of a case under sect. 26 of the *Lunacy Act*, 1891, and it appeared to me to raise a somewhat important question. [His Lordship

referred to the provisions of sect. 94 of the Act of 1890, and sect. 26 of the Act of 1891, and continued:—]

The Master has, under sect. 26, sub-sect. 2, power to order the examination of the alleged lunatic, whether there is a trial of an issue with a jury or not. In this case an inquisition was directed and was being held. Certain evidence had been taken, and it was important to obtain evidence as to the state of mind of the alleged lunatic by a medical practitioner who had seen her. The Master, therefore, made an order that she should attend at a certain time and place to be examined by Dr. *Maudsley*, for the purpose of enabling him to give evidence as to her state of mind. She refused to attend, and a further order was made, that if she persisted in her refusal and did not attend, she should be committed. The matter was then brought before the Lords Justices, who decided that either the Master or the Court had power to make the order; but, out of consideration for the position of the lady, they suspended the operation of the order for committal until the expiration of fourteen days after her return within the jurisdiction, she being then abroad; and she was meanwhile invited to appear before the one of the Lords Justices who should be attending to Lunacy matters, and to communicate with him in order to shew whether she had any reasonable grounds for refusing to attend and be examined. The lady attended before me. She did not seem quite to understand the object for which her attendance was required. I explained it to her, and told her that it was necessary for her to obey the order. She then left my room; and subsequently she communicated to me that she had decided to attend for examination, and she has attended.

The object of the order was that the Master might be enabled by means of an examination, to have evidence in the pending inquisition as to the state of mind of the alleged lunatic. The medical practitioner has done what he was not bound to do: he has put the result of his examination into the form of a letter which he has addressed to the Petitioner's solicitors. That is to say, he has furnished them with a "proof" of what he can depose. He is to be called as a witness on the inquisition, and the advisers of the alleged lunatic will hear all that he has got

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to say stated on oath before the Master. They will have the power to cross-examine him, and can apply to the Master to order that what he has written should be produced to them if they think fit. I express no opinion as to how the Master ought to act in the matter; that is entirely a matter for him. He has a discretion to do as he thinks best, and he may or may not order it. I say nothing as to that. But how does this report differ from the ordinary proofs of witnesses in other cases? Mr. *Costelloe* admits that he has no right to the production of the proofs of the other witnesses to be called by the Petitioner; but he says that this is a different case, because here the Court has the power to order, and has ordered, the alleged lunatic to attend and submit to be examined. But, in the first place, the Act does not say either that the medical practitioner is to make a written statement, or, that if made, it is to be communicated to the other side. So that Mr. *Costelloe* must support his contention upon the principles of natural justice; and I know of no principle according to which a party is entitled to see the proofs of the witnesses of the other side. Nor do I see any reason why, at this stage, the alleged lunatic is, as a matter of justice, entitled to see that which the doctor has put into writing, and which is practically his proof, before he is called as a witness. He need not have put anything into writing; and suppose he had not—suppose that his proof had been taken in the usual way, by a solicitor's clerk, how could the other side have been entitled to see it? I can see no reason why that which is not more than a proof should be seen by them before the inquisition. I agree that if the medical practitioner could be treated as an officer of the Court while examining the alleged lunatic, it would not be right that his statement in writing of the result of his examination should be produced to either party without the leave of the Court. But he was not attending as an officer of the Court, or employed by the Court at all. He simply acted under the permission of the Master to promote the ends of justice. In order to enable him to get at the truth upon his inquiry, leave was given for the lady to be examined by a medical practitioner, so that his evidence might be used upon the inquisition. That is all that happened. He was in no way an officer of the Court, or employed by the

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Court. He was only employed so that the Petitioner might be in a position to give trustworthy evidence before the Master, and he is simply in the position of a witness whom the Petitioner desires to call. The application fails, and must be refused with costs.

Solicitors: *Lickorish & Bellord; Irvine, Hodges & Co.*

W. W. K.

In re WILLS' TRADE-MARKS.

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1892
KEKEWICH, J.
March 26; *April* 6.
C. A.
June 2.

Practice—Discovery—Production of Documents—Motion to remove Trade-mark from Register—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 12.

In proceedings to remove trade-marks belonging to a firm from the register after all the evidence had been put in with the exception of the cross-examination of two witnesses which was to take place in Court, the Applicant took out a summons asking that the Respondents might be ordered to make an affidavit of documents relating to the matters in question. By the direction of the Court the Applicant stated in writing the grounds upon which he sought to have the marks removed :—

Held, by *Kekewich*, J., that an order ought to be made following the usual form as far as possible, but directing (1.) that the Respondents should give the discovery by a named member of their firm who should be the one to be examined in Court; (2.) that the documents to be produced should be those relating to certain specified questions, and (3.) that notwithstanding the generality of the order the Respondents should not be bound to set forth in schedules, or otherwise to mention, all the labels or other documents constituting a class; but it should suffice, as regarded each class of labels or other documents, to mention a specimen or specimens fairly representative of the whole :

Held, by the Court of Appeal, that the order was oppressive at that stage of the proceedings; and that the order must be discharged without prejudice to any order which the Judge at the trial might think fit to make as to production of documents.

Per Kekewich, J. :—In proceedings for the removal of a trade-mark from the register, an order for discovery of documents ought not in general to be made in the common form, but the extent of the discovery to be enforced must depend upon the particular circumstances of each case, and the order ought to be guarded in such manner as to prevent, so far as possible, the inconvenience, with its additional delay and expense, which might result from requiring a trader to set forth all the labels and other documents touching a particular trade-mark from time to time used in his business.

It is convenient in such a case that the Applicant should state in

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writing to the Court the grounds on which he seeks to have the mark removed from the register.

ADJOURNED SUMMONS.

An application by *R. I. Dexter* for the registration of a trade-mark was opposed by Messrs. *W. D.* and *H. O. Wills*, who were the proprietors of two trade-marks, already on the register, numbered 5908 and 52425, and consisting respectively of the word "*star*" used in reference to tobacco and registered as an old mark, and of a label including the device of a star and registered as a new mark.

The Comptroller General of trade-marks decided in favour of *Dexter*, and the Messrs. *Wills* appealed to the Board of Trade, by whom the matter was referred to the Court.

After all the evidence in *Wills'* appeal had been put in, *Dexter* moved that their marks numbered 5908 and 52425 might be removed from the register, and by desire of the Court he stated in writing the grounds upon which he based his motion. The nature of these grounds sufficiently appears from the judgment.

Evidence was gone into on the motion, and notice was given on both sides to read the evidence on the appeal as evidence on the motion. An order was made for the cross-examination before the examiner of all the witnesses except one of the Messrs. *Wills*, who was to be examined in Court. *Dexter* had only been partially cross-examined, and by arrangement between the parties his further cross-examination was to take place in Court; but, with these exceptions, the examination of the witnesses had been completed, and the whole of the evidence put in.

Dexter then took out the summons asking that the Messrs. *Wills* might be ordered, within seven days after service of the order to be made thereon, to make and file a full and sufficient affidavit stating whether they then had or had previously had in their possession or power any, and what, documents relating to the matters in question, and accounting for the same, and for the usual order for production and inspection of such documents.

The summons was heard in Chambers. The Chief Clerk proposed to make the usual order for discovery of documents, but

at the request of the Messrs. *Wills* adjourned the matter to the Judge.

At the hearing before the Judge the Messrs. *Wills* offered to give an undertaking in the following terms: "We undertake to give notice of any labels on which we intend to rely; also to have relevant documents in Court, and not to object to notice to produce." *Dexter* declined to accept this offer.

The summons was then adjourned into Court, and came on for hearing before Mr. Justice *Kekewich* on the 26th of March, 1892.

Renshaw, Q.C., and *J. Cutler*, for the Applicant:—

We submit that the Court has full jurisdiction to make an order for discovery of documents in a proceeding of this kind. Order XXXI., rules 1, 12, of the Rules of 1883, are more extensive than the rules for which they were substituted, and provide for discovery not merely in an action but in any cause or matter; and in *In re Norwich Town Close Estate Charity* (1), Lord Justice *Lindley* said that the same discovery could be obtained on a summons as on an information: and see *In re National Funds Assurance Company* (2); *In re Haddan's Patent* (3); *Judicature Act*, 1873, s. 100.

[*Warmington*, Q.C., for the Respondents, said that they did not wish to depart from the offer which they had made, and therefore did not contest the jurisdiction.

KEKEWICH, J.:—I have a strong impression that I have jurisdiction to make the usual order for discovery in this proceeding, and I therefore have no difficulty in so assuming.]

We ask for the usual order for discovery: *Cooke* v. *Smith* (4).

[KEKEWICH, J.:—It would be very burdensome if the Messrs. *Wills* were required to specify all the labels they have ever had in their possession or power in the course of this business.]

They ought to give discovery bearing on the several grounds of objection to their marks, and in particular as to their mode of user of the word "star" and of the device of a star so as to shew whether either the one or the other is common in the trade, and

(1) 40 Ch. D. 298, 310.
(2) 24 W. R. 774.
(3) 54 L. J. (Ch.) 126.
(4) [1891] 1 Ch. 509.

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whether they have used, or have permitted others to use, labels or marks tending to destroy the distinctive character of the registered marks. There are also persons against whom Messrs. *Wills* have taken proceedings for alleged infringements of the registered marks, and they ought to give discovery in reference to such proceedings and infringements.

Warmington, Q.C., and *Hopkinson*, Q.C., for the Respondents:—

We submit that an order for discovery in general terms ought not to be made. The evidence is practically closed, and this application is an attempt to reopen the case. Order XXXI., rule 12, does not contemplate or authorize the making of such an application at such a stage of the proceedings. If the discovery sought is to be given, and made use of, the Court in justice to both sides must allow evidence to be gone into as to the nature of the documents and the use which has been made of them. The offer which the Respondents have made is sufficient for all purposes, and ought to be accepted. Even in an ordinary case the *onus* is on the applicant to shew a case of convenience for the granting of the discovery: *Downing* v. *Falmouth United Sewerage Board* (1); and *à fortiori* it must be so where the evidence in chief is closed.

Renshaw, in reply:—

The evidence is not closed. The only evidence which is really complete is that of the trade witnesses. The important witness is Mr. *Wills*, who has not yet been cross-examined. The offer made is not sufficient. We want production of these documents which will destroy the case of the Respondents; *ex. gr.* labels showing the star in combination with other words or devices. They will not rely upon any document of that kind, and we ought not to be dependent upon them for the production of what they choose to call relevant.

April 6. KEKEWICH, J.:—

As frequently happens in trade-mark cases there are here cross-applications. Messrs. *Wills* are opposing a proposed re-

(1) 37 Ch. D. 234, 242.

gistration by Mr. *Dexter*, who seeks to expunge from the register two trade-marks of Messrs. *Wills*. There are of course no pleadings, and except that, at my suggestion, Mr. *Dexter* has stated the grounds of his motion in writing, there is no document or combination of documents in which the questions to be decided between the parties are precisely set forth. There are indeed some affidavits which I have not yet seen, and possibly questions could be more or less conclusively extracted from them; but it is not the office of an affidavit to state questions, and moreover the evidence is not closed, so that other questions may yet be started, or some of those already apparent may become insignificant. It is under these circumstances that Mr. *Dexter* requires Messrs. *Wills* to make an affidavit of documents "relating to the matters in question herein." Messrs. *Wills* are not unwilling to give some discovery, but they oppose an order in these general terms. It is not disputed that the Court has power to make an order in any form required to do justice between the parties. In *In re Norwich Town Close Estate Charity* (1), Lord Justice *Lindley* said: "You can get the same discovery . . . on a summons as on an information," and having regard to Order XXXI., rule 12 (among others), and the general jurisdiction and practice of the Court, I have no doubt of the accuracy of this statement, wide though it be. But it is obvious that to make an order in a trade-mark case in the common form used in actions might be productive of great hardship. If a trader were bound to set forth in a schedule all the labels and other documents touching a particular trade-mark from time to time used in his business his task would be one of extreme difficulty, equivalent to practical impossibility, and he would expend thereon a vast amount of labour and time incommensurate with the advantage to his opponent or the advancement of justice between them, and the costs of what is intended to be a summary proceeding might, and probably would, be enormously increased. It is further objected on the part of Messrs. *Wills* that it is not the course of the Court to order discovery after the evidence has been put in, and that to do so would induce inconvenience and confusion. There is much to be said in favour of this view; but, as already stated,

(1) 40 Ch. D. 310.

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the evidence is not closed. I have given leave for the examination of Mr. *Wills* orally in Court, and Mr. *Dexter* may also be examined in like manner, and on the latter's behalf it is urged that discovery is necessary for the proper conduct of Mr. *Wills'* cross-examination. What is to be done? Messrs. *Wills* offered to give an undertaking to deliver a statement of the labels on which they intend to rely, and to produce samples, and also to produce the relevant documents in Court, and not to take any objection that they have not had a sufficient notice to produce. But I do not think that this would suffice to afford Mr. *Dexter* the full information to which he is entitled, or to make available to his counsel the materials for Mr. *Wills'* cross-examination. I think that the discovery to be enforced in this class of applications must depend upon the particular circumstances of each case. As at present advised I should not in any case be disposed to refer to the affidavits as containing the limits of the discovery required, and if I had not any statement of the questions in writing I should be disposed to require one before making an order. Here I have a written statement of Mr. *Dexter's* grounds, and it seems possible to frame an order on that basis which will answer all practical purposes. I do not say that it is necessarily final, and that some addition or variation may not afterwards be required; but it will be sufficient for the moment, and I hope altogether. This or any other like order ought, I think, to be guarded in such manner as to prevent, so far as possible, the inconvenience, with its additional delay and expense, to which reference has above been made.

The order will follow the usual form as far as possible, the modifications to be now stated, and which explain themselves, being incorporated therein. First, Messrs. *Wills* will be directed to give the required discovery by a named member of the firm, who will be the one to be examined in Court. Secondly, the documents will be those relating to the following questions:—

1. When first, and during what period, Messrs. *W. D.* and *H. O. Wills* used a "*star*," either as a word or as a device in their trade?

2. Whether the word "*star*" was at any, and what, time common to the tobacco trade, or in common use?

3. What trade-marks, embodying a "*star*," either as a word or as a device, were used by Messrs. *W. D.* and *H. O. Wills* before the 13th of August, 1875?

4. Whether a "star" has been used, either as a word or as a device, to designate tobacco manufactured or sold by any other, and what, persons for any and what period?

5. Whether Messrs. *W. D.* and *H. O. Wills* have used any, and what, labels tending to destroy the distinctive character of their alleged trade-mark of a "*star*"; and

6. Whether Messrs. *W. D.* and *H. O. Wills* have permitted any other, and what, persons to use a "*star*," either as a word or as a device, in connection with tobacco since the registration of either of their trade-marks now in dispute?

Thirdly, notwithstanding the generality of the order, Messrs. *Wills* shall not be bound to set forth in schedules, or otherwise to mention, all the labels or other documents constituting a class, but it shall suffice as regards each class of labels or other documents, to mention a specimen or specimens fairly representative of the whole.

It will be reasonable to allow a month for filing the affidavit, and the costs of the application will be costs in the motion for expunging Messrs. *Wills*' trade-marks.

C. C. M. D.

C. A.

From this order *W. D. Wills* and *H. O. Wills* appealed.

The appeal was heard on the 2nd of June, 1892.

Hopkinson, Q.C., and *Stanley Wills*, for the Appellants.

Renshaw, Q.C., and *J. Cutler*, for the Respondent.

LINDLEY, L.J.:—

There is nothing in modern times which requires greater care than making orders for discovery and inspection of documents. The old practice of the Court of Chancery was limited to cases with which the Chancery Courts were familiar, such as breaches of trust where all the documents were in the possession of a trustee, and the *cestui que trust* knew nothing about the matter;

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and in that class of case the practice of the Court of Chancery was admirable, and without it it would have been impossible to administer justice. But the tendency to extend the power of the Court to order discovery in cases of a totally different character ought to be very carefully checked, and certainly not encouraged. Nowadays a man cannot run over another in the streets without there being an application for an affidavit of documents. An undue extension of an old and just principle has given rise to enormous expense and great oppression. In this particular case I am satisfied that no oppression is desired; but I feel perfectly convinced that a conscientious man would be grievously oppressed by having to make such an affidavit as he has been ordered to make by the order of the Court below. The Respondent appears to know of some labels already which, according to his view, invalidate Messrs. *Wills'* case. He does not want notice of those. Therefore, I think the right order to make will be this: Let the order appealed from be discharged, but without prejudice to any order which the Judge at the trial may think fit to make with respect to the discovery of documents. This must be on the terms that the Defendants give the undertaking, which they offered to give in the Court below, to deliver a statement of the labels on which they intend to rely, and to produce documents in Court. The costs of the application before Mr. Justice *Kekewich* and of the appeal to be costs in the proceedings.

BOWEN and KAY, L.JJ., concurred.

Solicitors: *Salaman; McKenna & Co.*

M. W.

BLACKMAN *v.* FYSH.

C. A.
1891
KEKEWICH, J.
May 12.
C. A.
1892.
June 22.

[1890 B. 1062.]

Will—Construction—Contingent Remainder or Executory Devise—Cesser of Life Estate on "being taken in execution by any process of law"—Appointment of Receiver for Judgment Creditor.

A testator devised a freehold estate to his son for life, and after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void and cease as if he were dead, and the estate devised to him should "thenceforth absolutely vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age and one under age, and he afterwards had other children:—

Held, by *Kekewich*, J., that the appointment of a receiver was a taking in execution within the meaning of the clause, and that the son's life estate determined. This decision was not appealed from:

Held, by the Court of Appeal (affirming the decision of *Kekewich*, J.), that as the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate, they were not contingent remainders but executory devises, and took effect in favour of all such children of the son whenever born as attained twenty-one.

J. H. FYSH, by will dated the 28th of November, 1870, devised to his son *James Henry Fysh* certain specified lands "to hold the same unto my said son for his natural life, and from and after his decease I give and devise the same estates unto, between, and amongst all the children of my said son, whether now or hereafter to be born, who shall live to attain the age of twenty-one years, or who being a daughter shall marry under that age, to hold the same to such child or children, if more than one, in equal undivided shares as tenants in common, and not as joint tenants, and to his, her, or their several and

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respective heirs and assigns for ever." He then devised another estate in moieties to his two daughters and their respective children, adopting as to each moiety precisely the same form of limitation as in the case of his son. He then proceeded: "And in case my said son, or either of my said daughters, shall depart this life without leaving lawful issue, or, leaving issue, all such issue shall depart this life under the age of twenty-one years and without leaving issue, then I give and devise the estates hereinbefore given and devised to such son or daughter so dying, or whose issue shall so fail, unto the survivors or survivor of my said children in equal undivided shares, and to the issue of such survivors or survivor to hold to them, him, or her, and their, his, or her issue, for such and the same estates and interests therein, and subject in all respects to the same charges and restrictions as are herein declared with respect to the estates by this my will originally given and devised to such surviving children or child. I hereby expressly declare and direct that neither of them, my said son and daughters, shall have any power to sell, dispose of, mortgage or charge, or otherwise anticipate his or her life estate and interest in the estates hereby given and devised to such son or daughters respectively, or the rents or income arising from the same. And in case my said son or daughters, or any or either of them, shall attempt to sell, dispose of, mortgage, charge, or anticipate the same, or in case such son or daughters shall become bankrupt or insolvent, or the estates hereby given or devised to such son or daughters shall be taken in execution by any process of law for the benefit of any creditors or creditor, then I hereby declare that the gift and devise thereof to such son or daughter shall immediately become absolutely void and cease, as if such son or daughter were then actually dead, and that the estates so given and devised to such son or daughter shall thenceforth absolutely vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto."

The testator died in 1879. *J. H. Fysh*, the son, entered into possession of the estate devised to him for life.

By an order made on the 9th of December, 1887, in an action of *Lickorish* v. *Fysh*, in the Queen's Bench Division, in which *J. H. Fysh* the son was the Defendant, *J. S. Lickorish*, one of the plaintiffs, was appointed receiver of the rents, profits, and moneys receivable in respect of the interests of the Defendant *Fysh* under his father's will. Directions were given for the receiver to pass his accounts, and pay the balances or such parts thereof as should be certified to be proper to be so paid, such sums to be paid in or towards satisfaction of what remained due in respect of a judgment signed against *Fysh* on the 16th of September, 1887, for £30 2*s.* 6*d.* debt, and £3 16*s.* costs.

On the 2nd of March, 1888, an order by consent was made in an action in the Queen's Bench Division of *Gregory* v. *Fysh*, in which *J. H. Fysh* the son was the Defendant appointing the Plaintiff *Gregory* receiver of the rents, profits, and moneys receivable in respect of the above property. Directions were given as to payment of the balances, or such parts thereof as should be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what remained due in respect of a judgment signed on the 17th of February, 1888, for £539 17*s.* debt and £5 6*s.* costs.

J. H. Fysh, the son, was twice married. By his first marriage he had two children—the Plaintiff, Mrs. *Blackman*, born on the 7th of October, 1863, and *Alice Fysh*, born on the 18th of May, 1871, besides children who died in infancy. He married again on the 30th of December, 1887, and had by his second wife two sons, born respectively on the 24th of June, 1888, and the 20th of September, 1889.

In 1890 the Plaintiff brought this action against her father, sister, and brothers, and against her husband, her husband's trustee in bankruptcy, and the trustees named in an ante-nuptial agreement for settlement of her property, asking for a declaration that her father's life interest had become void and ceased; and a declaration that on its becoming void and ceasing she, and her husband in her right, became absolutely entitled to the whole of the property.

The action was heard before Mr. Justice *Kekewich* on the 12th of May, 1891.

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Renshaw, Q.C., *Macnaghten*, and *A. J. Chitty*, for the Plaintiff:—

The life estate of *J. H. Fysh*, the son, was determined by the receivership order of the 9th of December, 1887, which was a taking "in execution by any process of law" within the meaning of the proviso in the will: see *Ex parte Evans* (1), *In re Pope* (2), shewing that a receivership order is a process of execution within 27 & 28 Vict. c. 112. If it is process within that Act, it must be so also within the terms of this will. *In re Shephard* (3) merely decided that an order for appointment of a receiver by way of equitable execution cannot be obtained as of right by a judgment creditor after the death of the debtor; and the general observations of the Court in that case to the effect that such an order is not strictly to be regarded as a form of execution must be read with reference to the subject-matter with which the Court was dealing.

Moreover, the consent by *J. H. Fysh* to the receivership order of the 2nd of March, 1888, was an "attempt to dispose" of the property within the meaning of the proviso, and therefore worked a forfeiture: see *Craven* v. *Brady* (4), and *Hurst* v. *Hurst* (5), which latter case shews how easily a forfeiture may be worked even though the creditor disclaims all interest.

The gift over which thus took effect on the determination of the life estate of *J. H. Fysh*, the son, was a contingent remainder. At that date the Plaintiff had attained twenty-one, and the only other child then in being was an infant; and the Plaintiff, therefore, as the "person next entitled," within the meaning of the proviso, became solely entitled to the whole property, there being no estate to support the contingent remainder in favour of the other children, and this will being previous to and unaffected by the *Contingent Remainders Act*, 1877 (40 & 41 Vict. c. 33): *Festing* v. *Allen* (6); *Jarman* on Wills (7); *Doe* v. *Woodall* (8).

[KEKEWICH, J., referred to *Miles* v. *Jarvis* (9).]

(1) 13 Ch. D. 252.
(2) 17 Q. B. D. 743.
(3) 43 Ch. D. 131.
(4) Law Rep. 4 Ch. 296.
(5) 21 Ch. D. 278.
(6) 12 M. & W. 279; 5 Hare, 573.
(7) 4th Ed. vol. i. p. 864.
(8) 3 C. B. 349.
(9) 24 Ch. D. 633.

In that case, as in *In re Lechmere and Lloyd* (1), if the gift had been construed as a contingent remainder, some members of the class which the testator expressly indicated would have been necessarily excluded; but here, if the proviso had not taken effect, all the children of *J. H. Fysh*, the son, might have become entitled. In *Marshall* v. *Gingell* (2) there was a direction for payment of debts, which was held sufficient to pass the legal estate to the trustees and so preserve the contingent remainders. For the same reason *In re Bedson's Trusts* (3) is inapplicable; because there the property was vested in trustees, and, the limitations being equitable, the proviso giving the property over in the event of the forfeiture of the life interest was construed by reference to those limitations.

Methold, for the children born after the receivership order:—

The gift over on the determination of the son's life interest under the proviso is an executory devise and not a remainder. A remainder is an estate which arises on the natural determination of the particular estate of freehold which precedes it, and a writ of execution is not the natural determination of a life estate. Moreover, a remainder cannot be created by proviso: *Jarman* on Wills (4); *Fearne* on Contingent Remainders (5); *Cogan* v. *Cogan* (6).

But even if the gift be a contingent remainder, it is protected in favour of these children by 8 & 9 Vict. c. 106, s. 8, which prevents the destruction of contingent remainders by reason of the forfeiture, surrender, or merger of the particular estate. The word "forfeiture" is used in a wide sense, and will include such a forfeiture as that which took place under the proviso in this will: *Brandon* v. *Aston* (7); 32 Hen. 8, c. 34, s. 1; *Duppa* v. *Mayo* (8); *Sulley* v. *Barber* (9).

Richings, for the second daughter:—

The limitation over took effect in favour of the Plaintiff and

(1) 18 Ch. D. 524.
(2) 21 Ch. D. 790.
(3) 25 Ch. D. 458; 28 Ch. D. 523.
(4) 4th Ed. vol. i. p. 864.
(5) 10th Ed. vol. i. pp. 17, 263.
(6) Cro. Eliz. 360.
(7) 2 Y. & C. Ch. 24, 30.
(8) 1 Wm. Saund. 276, 288.
(9) 59 L. T. (N.S.) 824.

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the second daughter, who alone were born previously to the receivership order. The words "would be next entitled" must refer to the moment of the forfeiture, and at that moment they alone were *in esse*. The gift over was to take effect as if *J. H. Fysh*, the son, were actually dead; and, therefore, all children subsequently born are necessarily excluded.

Swinfen Eady, for *J. H. Fysh*, the son:—

I submit that there was no forfeiture of this life interest. A condition of forfeiture ought to be construed strictly in favour of the person whose estate is liable to be defeated. Here the estate was a legal life estate, and could have been reached by the ordinary legal form of execution. Therefore it was not a proper subject for "equitable execution" by appointment of a receiver, which is merely a kind of equitable relief available in aid of a defective remedy at law: *In re Shephard* (1); *Manchester and Liverpool District Banking Company* v. *Parkinson* (2); *Ex parte Charrington* (3). Before the *Judicature Acts*, a plaintiff filing his bill for a receiver by way of equitable execution had to shew that he had sued out a writ of *elegit*: *Neate* v. *Duke of Marlborough* (4). That is no longer necessary: *Ex parte Evans* (5); but the principle remains that before a receivership order by way of equitable execution can be obtained, it must be ascertained that there is no ordinary process of execution, known to the law, which is available. If there is such a process, it must be pursued: *In re Shephard.*

[KEKEWICH, J.:—*In re Pope* (6) is a very strong case against you, unless the meaning of the words "equitable execution" is cut down by the decision in *In re Shephard.* It is difficult to suppose that the Court of Appeal in that case intended to overrule *Hatton* v. *Haywood* (7).]

The old jurisdiction of the Court of Chancery is unaffected by 27 & 28 Vict. c. 112: see *In re Pope* (8).

(1) 43 Ch. D. 131.
(2) 22 Q. B. D. 173.
(3) Ibid. 187, 191.
(4) 3 My. & Cr. 407.
(5) 13 Ch. D. 252.
(6) 17 Q. B. D. 743.
(7) Law Rep. 9 Ch. 229.
(8) 17 Q. B. D. 743, 750.

It follows that neither of these receivership orders was a taking "in execution by any process of law."

If so, the act of this Defendant in consenting to the order of March, 1888, was not an attempted disposition within the proviso in the will. There could not be an "attempt" unless the attempted disposition would, but for the proviso, have been effectual; and here the disposition was ineffectual independently of the proviso: *Graham* v. *Lee* (1).

Renshaw, in reply:—

The receivership orders were properly made by a Court of competent jurisdiction, and cannot now be questioned; they therefore clearly amounted to a taking in execution by process of law. The testator intended the estate to go over in the event of the personal enjoyment by his son being interfered with, and the receivership orders had that effect.

8 & 9 Vict. c. 106 has no reference to a forfeiture of this kind which takes place by reason of the act of the party taking under the will, but applies to forfeiture by operation of law—*e.g.*, by a feoffment having a tortious operation. The first part of the will clearly creates a contingent remainder, and the proviso merely accelerates that remainder, and cannot be construed as converting it into an executory limitation.

KEKEWICH, J.:—

This will gives rise to some questions of considerable difficulty, depending, not on the language of the testator—which, if read with reference to what has occurred and the claims set up, is apparently easy to construe—but in consequence of events which have happened and which were contemplated by the testator himself. The two questions which call for decision, though intimately connected, are really independent. The first is whether, by reason of the receivership orders, or either of them, the Defendant, *J. H. Fysh*, has forfeited his life interest. Of course, I use the word "forfeited" in the common sense, without reference to the particular language of the will, which does not employ the word "forfeiture." *J. H. Fysh* is made

(1) 23 Beav. 388.

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tenant for life with remainder to his children. To that remainder I shall have to return presently. The testator, after having disposed of the property in that way, and said all that he thought it necessary to say about the children taking in remainder, proceeds to provide against any disposition by his son of that estate for life. In doing so, he refers not only to the son's estate, but to the estates given to the daughters of a like character, and makes one comprehensive clause which, without being otherwise than in ordinary form, is rather a collection of forms than one form. It begins by declaring and directing that his son (reading it as applicable to the son only) shall not have power to sell or otherwise anticipate his life estate. I read that as an introductory paragraph expressing the object of the testator in what he afterwards proceeds to do, and therefore as construing what follows. Then he goes on to direct that if his son shall attempt to sell or anticipate his life interest [His Lordship here read the clause] it shall go over in the manner which gives rise to the second question. Reading that by the light of his introductory paragraph, I cannot doubt that he contemplated and wished to provide against his son being voluntarily or otherwise deprived of what has been in many cases called the personal enjoyment of the estate. The object of all these clauses is to secure the personal enjoyment to the donee, and to insist on the estate for life not going to a trustee in bankruptcy or other person who would interfere with that enjoyment. Reading it in that way, I do not feel so much difficulty as I otherwise should as to the words "taken in execution by any process of law."

On the 9th of December, 1887, a receivership order was made at the instance of judgment creditors of *J. H. Fysh*, and one of the creditors was appointed receiver of the estate to a limited extent, so that for a time and to a certain extent *J. H. Fysh* was deprived of the estate. As, in my opinion, that order is sufficient to work a forfeiture, I think it unnecessary to say anything about the other order, which has peculiarities of its own not more favourable to the debtor. It is said that the former order is not a taking in execution by any process of law or for the benefit of creditors. The estate is taken, and taken by a process

of law; the order stands, and must be accepted as good. The estate, being taken by a process of law, is taken for the benefit of a judgment creditor. The only question that remains is whether it can be strictly said to be "taken in execution." What is the meaning of "taken in execution"? Read irrespectively of authorities, it means taken by process of law for the enforcement of a judgment creditor's right and in order to give effect to that right. So read, there can be no doubt that this income was taken in execution. But it is said that the testator has used a technical phrase, that it must be construed technically, and that the appointment of a receiver is not "execution." It has been called "equitable execution" over and over again, and, without presuming to criticise the language of the Judges in the Court of Appeal, I observe that sometimes they almost imply that it is execution even while saying that it is not. In *In re Pope* it was clearly declared to be a form of execution, and it was explained how that was. In the later case of *In re Shephard* there are, no doubt, strong expressions to shew that it is not to be regarded as execution. Lord Justice *Fry* says: "The idea that a receivership order is a form of execution is, in my opinion, erroneous"; but he explains this later on, when he says: "It has often been spoken of by Judges as equitable execution; but I am afraid that this concise expression has led to the erroneous idea that the appointment of a receiver is a form of execution which can be obtained without shewing to the Court the existence of the circumstances creating the equity, on which alone the jurisdiction arises," and that may be read as meaning that it is a form of execution, but is not execution of the particular character there described, and with which the Court was then dealing.

It is only right, when reading the judgment of the Court of Appeal or of any other Court, to have regard to the particular case in hand, and not to extend the language of Judges to a different state of facts from that before them. There they were determining whether the appointment of a receiver belonged to that class of executions with which practitioners are familiar, by which a debt is enforced without any notice to the judgment debtor. They held that it was not equitable execution, but

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something different—viz., equitable relief to be granted according to the rules of equity, one of which is, that the party must be summoned before the Court and have an opportunity of being heard before the order is made against him. That was really the question they had to consider, and I cannot take it that they determined that in an instrument such as this, where one must have regard to the intention of the testator, a receivership order which deprives a tenant for life of the enjoyment of his estate is not a taking in execution by any process of law for the benefit of a creditor. In that very case one of the Lords Justices pointed out that now you may have a receivership order even at the instance of a legal mortgagee if circumstances justify it. So here, although apparently the tenant for life had the legal estate and the judgment creditor might and ought to have issued an *elegit*, I must, as there is the receivership order not touched, take it for granted that the judgment creditor was entitled to the receivership order. That being so, this proviso operates, and the estate of the tenant for life determines as from the date of that order.

Then another question arises. The testator has given this property to his son, *J. H. Fysh*, for life, and then, by words which admit of no doubt, and as to which no doubt has been suggested in argument, he has given the property to his son's children attaining twenty-one, or, in the case of daughters, marrying under that age—a very common form of gift, which is familiar to all who are conversant with wills. If, therefore, the son were dead, it would be perfectly clear to whom the estate would go—viz., to his children, to be ascertained at his death, or within a few months after it, and they would take absolutely vested interests at twenty-one or marriage, and not before. There is no shadow of doubt about that. But then the testator introduces a proviso by which, having determined the life estate in an event which he contemplates, and which has happened, he proceeds to say what is to happen to the property in that event. Mr. *Renshaw* says he has done so in a modern form, which is intended to meet the case and avoid difficulties; but I hope there is some modern form which is better adapted to avoid difficulties. We are familiar with a form of this sort in an ordinary settle-

ment of personal estate, where the wife's property, in the event of her dying without issue and without exercising a general power of appointment, is limited to her next of kin according to the *Statute of Distributions*, excluding her husband. That form has often been tested, and is well understood. This form is intended to answer the same purpose. It has given rise to the question which I am now considering, and for that reason I am justified in saying that it is not perfect. The difficulty is, that it contemplates as an actual event that which, *ex concessis*, is not an actual event. That is a necessary difficulty in the case which has to be faced. Then it has to be considered that the form ought to indicate the persons who are to take, not only in the event contemplated by the earlier part of the will, but at the time mentioned in the latter part, when the estate has determined, on the occurrence of what I may describe as the unnatural event. The clause fails to do that with precision. The testator regards his son for this purpose as actually dead, and says that the estate is to vest in "the person or persons who, under the devises and limitations hereinbefore contained, would be next entitled thereto." He does not say, as in the form to which I have referred, "to the person or persons who would have been next entitled thereto if he had died at that moment without leaving any other children than those then alive"; but he expressly refers back to the "devises hereinbefore contained," and he says that those who would be next entitled thereto are to take. Who are the persons who under the previous gift would have been so entitled? All the children who attained twenty-one, or being daughters married. There is no question about that. In order to exclude any of them, I must introduce such words as I have mentioned, and must, to that extent, twist the language of the testator, and make him say that which he has not said; and I must get rid of the words, "under the devises and limitations hereinbefore contained," and that, to my mind, would be a much greater difficulty. Therefore, construing this will as well as I can, the clause seems to me to mean that the son is to be regarded as dead, and the estate is to go over as if he were dead to the persons to whom the testator has before given it. The question is, can they take? If this is a contingent remainder, they

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cannot; because there is no estate to support the remainder, and the will is before the late Act. Therefore, the one child who had attained twenty-one, the only child who had attained that age on the 9th of December, 1887, would take the whole in fee. That depends on *Festing* v. *Allen* (1) and other cases which were not criticised, and to which I need not refer. Both Mr. *Renshaw* and Mr. *Methold* relied on the definition of a remainder given by Mr. *Jarman* (2), and which is also to be found in the same words in other text-books. It is an "estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument." I have been referred to the case of *Cogan* v. *Cogan* (3), and to the remarks of Mr. *Fearne* upon it; and they point to and support the conclusion that you cannot have a remainder by proviso—that is to say, you cannot determine an estate by proviso so as to make the estate which comes in by virtue of the proviso a remainder.

That is the result of the authorities. If it could be construed as a remainder the difficulty would be out of the way; but here I cannot do that, and I must rely on the case before the late Master of the Rolls, *In re Lechmere and Lloyd* (4), and on *Miles* v. *Jarvis* (5), which shew that, if effect can be given to the undoubted intention of the testator by construing the clause as an executory devise, the Court ought to do so rather than construe it as a remainder, and thereby defeat that intention. Here his intention to benefit all his son's children is clear, and, if I construe the proviso as a remainder, I exclude some of them and defeat that intention. I therefore come to the conclusion that the proper way to construe this will is to hold that the proviso creates an executory devise and not a remainder.

Then who are the persons to take? The Plaintiff had attained twenty-one on the 9th of December, 1887, so she undoubtedly takes a share. Another daughter was *in esse* at that time, so she also takes if she attains twenty-one. Of Mr. *Methold's* clients one was *in esse* in the eye of the law and the other was not; but I think they must both be let in, as well as any children of *J. H.*

(1) 12 M. & W. 279; 5 Hare, 573.
(2) 4th Ed. vol. i. p. 864.
(3) Cro. Eliz. 360.
(4) 18 Ch. D. 524.
(5) 24 Ch. D. 633.

Fysh who may be born hereafter. If it were a remainder there is a well-known rule which is stated in *Fearne* on Contingent Remainders (1): "Where a contingent remainder is limited to the use of several, who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet shall it dévest as to the proportions of the persons afterwards becoming capable, before the determination of the preceding estate." So, if it were a remainder, I should be obliged to let in those who became members of the class before the date of the receivership order and no more. But, construing it as an executory devise, I am obliged to let in the whole of the children. That decision is assisted by *In re Bedson's Trusts* (2), where there was a bankruptcy, and the Court of Appeal, affirming the decision of *Pearson*, J., allowed all the children to come in, notwithstanding that some of them were born after the adjudication.

The judgment of *Pearson*, J., having been affirmed, it is right for me to refer to what he said (3): "It is said that the words 'as if he was naturally dead,' mean that the line is to be drawn at the date of the bankruptcy, and that no child born after that date can possibly take any part of the fund. To my mind the proper meaning of the words is this, that the devolution is to take place in the same way as if the son had been then dead, that is to say. the fund is to devolve upon all his children who shall attain twenty-one."

That is what the testator here has intended and has said. Accordingly, I must hold that not only the Plaintiff, but all the other children of *J. H. Fysh*, take contingently on their attaining twenty-one, or in the case of daughters marrying under that age.

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The Plaintiff appealed from this decision. The appeal was heard on the 22nd of June, 1892.

Renshaw, Q.C., and *Macnaghten*, for the appeal:—

We say that the limitations are contingent remainders, and that the Plaintiff, being the only child who had attained twenty-

(1) 10th Ed. vol. 1. p. 312. (2) 25 Ch. D. 458; 28 Ch. D. 523.
(3) 25 Ch. D. 461.

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one when the particular estate determined, took the whole estate. In *Purefoy* v. *Rogers* (1) the law is clearly laid down that a limitation shall not be construed an executory devise if it is capable of taking effect as a contingent remainder. Now, the forfeiture clause makes forfeiture equivalent to death, and the gifts to those who have not attained twenty-one when the forfeiture takes place fail: *Festing* v. *Allen* (2); *Rhodes* v. *Whitehead* (3). Mr. Justice *Kekewich* relied on *In re Lechmere and Lloyd* (4); but that turned on the words "either before or after her decease," which made it impossible to ascertain the class at the death of the tenant for life, and made the limitation not a contingent remainder.

But, if the gift be an executory limitation, there is no fresh class gift, but merely a reference back to the previous limitations, an acceleration of the subsequent estates. The consequences of forfeiture are to be the same as if the tenant for life were dead, and the subsequent takers must be ascertained on the footing of his having then died. *Craven* v. *Brady* (5) is an instance of acceleration. [They were then stopped by the Court.]

Neville, Q.C., and *Richings*, for *Alice Fysh*:—

The gift over to the survivors of the testator's children is so expressed as to be inconsistent with the idea that the limitation to the son's children is a contingent remainder to the children who attain twenty-one. The gift over is if a son or daughter of the testator dies without leaving issue, or, leaving issue, if the issue die under twenty-one without leaving issue. This quite distinguishes the case from *Festing* v. *Allen*, where the gift over corresponded with the original gift. We say, then, that *Alice Fysh* must be let in though she had not attained twenty-one at the time of forfeiture.

Methold, for the younger children:—

The gift which has taken effect is not a contingent remainder; it is a gift on forfeiture. A remainder must take effect on the

(1) 2 Wm. Saund. 380.
(2) 5 Hare, 573; 12 M. & W. 279.
(3) 2 Dr. & Sm. 532.
(4) 18 Ch. D. 524.
(5) Law Rep. 4 Ch. 296.

natural determination of the prior estate; if a limitation does not do so, but takes effect in defeasance of the prior estate, it is not a remainder, but an executory limitation. This is the case where a life estate is determined under a clause of forfeiture: *Fearne* on Contingent Remainders (1); *Cogan* v. *Cogan* (2). The case, therefore, stands as if the estate had originally been given, without any prior life estate, to all the children of the son born or to be born who should attain twenty-one; and this would take effect in favour of all his children who do so, at whatever time they were born.

Renshaw, in reply:—

The ultimate limitation was not intended to enlarge the class of takers. Where there is a gift after a life estate to children who shall attain twenty-one, it has always been held for convenience of distribution that no child born after the first child has attained twenty-one can be let in.

LINDLEY, L.J.:—

This case, when fully understood, appears to me to present no real difficulty. The construction put by Mr. Justice *Kekewich* on this will has the merit of giving effect to the testator's intention. Mr. *Renshaw* argued that owing to certain rules of law we could not give effect to that intention; but in my opinion there are in the present case grounds which not only enable us, but require us to give effect to it. The testator devises certain lands to his son for life, and from and after his decease he devises them "unto, between, and amongst all and every the children of my said son, whether now or hereafter to be born, who shall live to attain the age of twenty-one years, or who, being a daughter, shall marry under that age, to hold the same to such child or children, if more than one, in equal undivided shares as tenants in common, and to his, her, or their several and respective heirs and assigns." Stopping there, the limitations to the children were clearly contingent remainders, and if the son had died, those of his children only who had before his death attained twenty-one, or being daughters had married under that age, would take. Then we

(1) 10th Ed. vol. i. pp. 16, 17, 263. (2) Cro. Eliz. 360.

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should have been obliged to give effect to the rules of law as to contingent remainders, and to defeat the intention of the testator that those who afterwards attained twenty-one should participate. I now pass to the clause under which the property actually went over. "I hereby expressly declare and direct that neither of them, my said son and daughters, shall have any power to sell, dispose of, mortgage or charge, or otherwise anticipate his or her life estate and interest in the estates hereby devised and given to such son or daughters respectively, or the rents or income arising from the same. And in case my said son or daughters, or any or either of them, shall attempt to sell, dispose of, mortgage, charge, or anticipate the same, or in case such son or daughters shall become bankrupt or insolvent, or the estates hereby given or devised to such son or daughters shall be taken in execution by any process of law for the benefit of any creditors or creditor, then I hereby declare that the gift and devise thereof to such son or daughter shall immediately become absolutely void and cease, as if such son or daughters were then actually dead, and that the estates so given and devised to such son or daughter shall thenceforth vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." It is impossible to treat the gift made by that clause to the children of the son as a remainder, since it is not to take effect on the determination of the life estate, but in defeasance of it. The rules as to contingent remainders, therefore, are not applicable to the case. Mr. *Neville's* point would deserve consideration if it were necessary to resort to it; but as we hold that the limitation is not a remainder at all, we need not deal with it. There is no doubt here that the intention of the testator was that every child of his son who should attain twenty-one should take. We are not dealing with personal estate, and there is no reason for cutting down the class of takers by excluding children born after a child had attained twenty-one. The appeal will be dismissed.

LOPES, L.J.:—

Till I heard Mr. *Methold's* argument I did not fully consider the effect of the forfeiture clause. If the first part of the dis-

position had stood alone, the limitations to the children of the son would have been contingent remainders. But the forfeiture defeats the life estate before its natural determination, and the limitations to take effect on that premature determination are not contingent remainders, but executory devises. Then, as to the persons who are to take, I think, having regard to the early part of the will, that all the children of the son whenever born who attain twenty-one are objects of the gift.

A. L. SMITH, L.J.:—

I am of the same opinion, and am glad that we are not compelled by cases or any rules of law to defeat the obvious intention of the testator.

Solicitors for Plaintiff: *Collyer-Bristow, Russell, & Hill*, agents for *Leak, Till, & Stephenson, Hull.*

Solicitors for the son: *Field, Roscoe, & Co.*, agents for *W. R. D. Ward, King's Lynn.*

Solicitors for *Alice Fysh*: *Sayle, Carter, & Simpson.*

Solicitor for the younger children of the son: *The Official Solicitor.*

Solicitors for the trustee in bankruptcy of the Plaintiff's husband: *Ward, Perks, & McKay.*

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[1891 H. 4461.]

Payment into Court—Liberty to Withdraw Admission and Amend Pleading—Terms on which Amendment Allowed—Rules of Supreme Court, 1883, *Order* XXVIII., *rr.* 1, 6.

The *cestui que trust* under a settlement sued *B.* and *J.*, who were in partnership as solicitors, to recover a sum of trust money alleged to have been received by the firm and not duly invested. *J.* was the sole trustee of the settlement, and was in difficulties. *B.*, by his defence, admitted that *J.* had paid the money into the banking account of the firm, but without *B.'s* knowledge; and he made a like admission in his answer to interrogatories. *J.* made a like admission. Upon these admissions, an order was made in Chambers for *B.* and *J.* to pay the money into Court. *B.* moved to discharge this order so far as it affected him, on the ground that this admission had been made by mistake, and he adduced evidence which shewed conclusively that the money never had come into the banking account of the firm. *Stirling*, J., held that *B.* ought to have leave to withdraw his admission as made by mistake, and to amend his defence, and discharged as against *B.* the order for payment into Court, on the ground that there was no such admission in *B.'s* affidavits as to justify such an order. The Plaintiff appealed:—

Held, on appeal, that as the admission was shewn to have been made by mistake, it was right that *B.* should be allowed to amend his defence for the purpose of withdrawing it; and that on the materials before the Court, apart from that admission, there was no such admission by *B.* of receipt of the money as would justify an order on him for payment into Court; but that, as on these materials there was still a strong case for contending that the firm had received the money, the order to amend ought not to have been made, except on the terms of the money being brought into Court.

Freeman v. *Cox* (1) discussed.

THIS was an action by an infant, *Ellen Maud Hollis*, who had become the sole beneficiary under a settlement of the 10th of October, 1877, to enforce payment from the Defendants, *George Burton* and *Francis James Jennings*, of a sum of £2000, which was subject to the trusts of the settlement.

The original trustees of the settlement were two, of whom the Defendant *Jennings* was one. The sum of £2000 was invested by the two trustees on mortgage of a property belonging to

(1) 8 Ch. D. 148.

T. Gorton. One of the trustees died in May, 1882. On the 20th of August, 1883, in pursuance of a notice given on behalf of *Jennings*, as the surviving mortgagee, calling in the money, the £2000 was paid off, and the mortgage transferred.

At this time the Defendants, *Burton* and *Jennings*, carried on business in partnership as solicitors under the firm of *Jennings, Son, & Burton.* The notice to call in the money was signed in the name of the firm. The business connected with the trust was, according to *Burton's* statements, transacted by *Jennings* alone; but apparently as part of the business of the partnership.

Jennings having fallen into difficulties, the solicitors of the Plaintiff asked to have a security for the £2000 produced; and no such security being forthcoming, the present action was commenced. The statement of claim alleged that the £2000 was, on the 20th of August, 1883, paid by the Defendant *Jennings* to, and received by the firm of, *Jennings, Son, & Burton*, and paid into their banking account, and had not been invested by the firm upon proper mortgage security, and prayed that the £2000 might be paid into Court, and that new trustees of the settlement might be appointed in the place of the two original trustees, and the fund paid out to such new trustees.

Jennings admitted, by his defence, that the £2000 had been paid by him to the firm and received by them and paid into their banking account.

Burton, by par. 5 of his defence, said: "The said money was in fact received by the Defendant *Jennings* on his own account, as trustee of the said settlement (if the same in fact was subject thereto), and by him or by his direction was paid into the banking account of the firm; but without any assent or concurrence of this Defendant."

Interrogatories were exhibited for the examination of the Defendants, the 4th of which was: "Was not the said sum of £2000, mentioned in the said statement of claim, paid by the Defendant, *Francis James Jennings*, to, and whether or not received by, the said firm of *Jennings, Son, & Burton*, and whether or not paid into their banking account on the 20th day of August, 1883, or at some other time, and when?"

Burton answered: "In answer to the 4th interrogatory, I say

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that a sum of £2000 was paid by the Defendant, *F. J. Jennings*, to the banking account of the firm on or about the date referred to."

Jennings made, by his answer, the same admission.

In the ledger of the firm, under the heading of an account, "*Hollis*' Trustee," were the following entries:—

"1883. Aug. 20. Principal from *T. Gorton* . . £2000"
"1883. Aug. 20. To *G. Martin's* estate on mortgage £2000"

On these materials Mr. Justice *Stirling*, on the 28th of March, 1892, made in Chambers an order on the Defendants to pay £2000 into Court within two months.

On the 16th of April *Burton* gave notice of motion that the order of the 28th of March might be discharged so far as it affected him.

By affidavit in support of this application, *Burton* stated that his admission of the payment of the £2000 to the banking account of the firm was made under a misapprehension, pressure of business having prevented his paying sufficient attention to the matter and that on investigation he had discovered that no such sum of £2000 had been paid into the banking account of the firm. The pass-book of the firm was put in evidence, and shewed that the £2000 had never come into their account.

Mr. *Gorton*, and the transferee of the mortgage, deposed that the transfer was executed in *Burton's* room, and the £2000 paid over to him. *Burton* deposed that the £2000 was laid on the table, and received and taken possession of by *Jennings*, and not by the firm. *Jennings*, by affidavit, denied this, and stated that *Burton* received the sum and retained it.

The motion was heard before Mr. Justice *Stirling* on the 27th of May, 1892.

Hastings, Q.C., and *Gregory*, for the motion:—

The admission, upon which the order was founded, was made by mistake, and was not in accordance with the true state of facts. The order ought, therefore, to be discharged, and the Defendant, *Burton*, ought to have an opportunity of amending his defence and putting in a further answer to the interrogatories.

Buckley, Q.C., and *Colt*, for the Plaintiff:—

Upon the admission made by the Defendant the order was quite right. Moreover, upon the evidence as it now stands, there is a sufficient case for ordering the Defendant *Burton* to pay the £2000 into Court.

In *Freeman* v. *Cox* (1), *Jessel*, M.R., made an order for payment in upon an unanswered affidavit; and that case was followed in *Porrett* v. *White* (2).

Hastings, in reply.

STIRLING, J.:—

This is a motion to discharge an order made by me in Chambers, by which I ordered the Defendant *Burton* to pay into Court the sum of £2000 upon the admission contained in his answer to interrogatories. The motion is based upon this, not that the admission as it stands in the answer to interrogatories is not sufficient basis for the order, but that the admission was made by mistake, and was not in accordance with the facts. In substance, it is an application for leave to withdraw the admission, and to put in a further answer stating the true facts.

Now the action is brought by the *cestui que trust* under an indenture of settlement made on the 10th of October, 1877, of which *Edward Billett Jennings*, now deceased, and *Francis James Jennings*, who is a Defendant in this action, were the trustees. *Edward Billett Jennings* and *Francis James Jennings*, and the Defendant, *George Burton*, carried on business as solicitors under the firm of *Jennings, Son, & Burton*, and the allegation in the statement of claim is that "the sum of £2000 being the trust fund subject to the trusts of the said settlement, and which was duly invested on mortgage of property belonging to a Mr. *Thomas Gorton*, was called in by the Defendant, *Francis James Jennings*, previously to the 20th day of August, 1883, but after the death of the said *Edward Billett Jennings*." Then the allegation is that "the sum of £2000 was paid by the Defendant, *Francis James Jennings*, to and was received by, the said firm of *Jennings, Son, & Burton*, on the 20th of August, 1883, and was

(1) 8 Ch. D. 148. (2) 31 Ch. D. 52.

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paid into their banking account. The said firm were then acting as solicitors for the Defendant, *F. J. Jennings*, the surviving trustee of the said indenture of settlement, and received the said sum of £2000 for the purpose of procuring a proper and sufficient investment on mortgage of the same sum, and they undertook such duty and liability. The Defendant, *George Burton*, well knew that the said sum of £2000 was money subject to the trusts of the said settlement." Then I pass on to paragraph 9, stating that application was made "to the said *George Burton* and *Francis James Jennings* to produce a security shewing the proper investment of the said sum of £2000 so paid to and received by them as aforesaid as solicitors to the said trust estate; but the Defendants have not produced any such security, and the said sum still remains in their hands uninvested, subject only to the said question of appropriation of the security hereinbefore referred to." Now, by his defence, *Burton* says: "This money was in fact received by *Jennings* on his own account as trustee of the settlement, and by him, or by his direction, was paid into the banking account of the firm, but without any assent or concurrence of this Defendant." He does not deny, as I understand, paragraph 9 of the statement of claim. Upon that he was interrogated, and the 4th interrogatory is this: "Was not the said sum of £2000 mentioned in the said statement of claim paid by the Defendant, *Francis James Jennings*, to, and whether or not received by, the said firm of *Jennings, Son, & Burton*, and whether or not paid into their banking account on the 20th day of August, 1883, or at some other time, and when?"

The answer to that is: "In answer to the 4th interrogatory, I say that a sum of £2000 was paid by the Defendant, *Francis James Jennings*, to the banking account of the firm on or about the date referred to." It has been pointed out that the interrogatory is not strictly answered; but I must assume that the answer was not intended to be evasive. I must read it against the Defendant *Burton* strictly, and hold that he meant by it to say that the sum of £2000 mentioned in the statement of claim was paid by *Jennings* to the banking account of the firm referred to. Then he is interrogated as to an entry in their ledger, which he admits was an entry dated the 20th of August,

1883: "To *G. Martin's* estate on mortgage, £2000, and principal from *Thomas Gorton*, under same date, £2000." There is an admission that that entry relates to the £2000 which is claimed in the action. Upon that I made the order. There was an admission that money had been paid to *Jennings*, the trustee, in the first instance, and was paid by him into the banking account of the firm, therefore making the firm responsible for it, with notice in the books of the firm that the £2000 belonged to *Hollis'* trustee; and there was nothing whatever to shew how the firm ever discharged themselves. Now, what Mr. *Burton* says is, that he made the admission that the £2000 was paid into the banking account under a mistake, and he explains that when the answer was prepared and sworn he was much engaged in other matters, and had not time to make such a thorough investigation into the books of the firm as he ought to have made; and he now says that no sum of £2000 was paid into the banking account on, or anywhere near, the 20th of August, 1883, and that what he had in his mind was a sum of £2000, which does appear to have been paid into the banking account on the 22nd of February, 1884, and which he states was an advance to the credit of certain bills. Now, the banker's pass-book, which is in evidence before me, bears out Mr. *Burton's* statement, and I must take it that the admission as to the £2000, which was a most material admission, in the answer and in the statement of defence, is erroneous, and I must give Mr. *Burton* an opportunity of putting that right by amending his statement of defence, and putting in a further answer to the interrogatories, so that the whole matter may be explained properly.

But then it is said that the facts, as disclosed by the affidavits which have been used upon this occasion, shew a case for making Mr. *Burton* pay the money into Court. Now, dealing with it in that way, I must look at what the authorities say. The case of *Freeman* v. *Cox* (1), which was referred to by Mr. *Buckley*, shews what the law is. It was a case before Sir *George Jessel*. He says (2): "The question is, whether there is a sufficient admission on the part of the defendant. In *Boschetti* v. *Power* (3),

(1) 8 Ch. D. 148. (2) 8 Ch. D. 149. (3) 8 Beav. 98.

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Lord *Langdale* observed: 'The Court cannot on motion order money to be paid or stock transferred into Court, unless it has a distinct admission of the defendant, that the money is in his hands or that the stock is in his name.' The new Orders have no reference to such a case. I will therefore make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the defendant must admit that the money is in his hands for the purpose of the application." That is the principle. Now, when once we set aside this erroneous admission made in the statement of defence, and the answer to interrogatories, what do we find? It seems to me that we do not find any admission, treat it as you will, that the money is in the hands of the Defendant *Burton* for the purposes of this application. Technically, it possibly may be said that there is; because in the statement of defence there is no denial of paragraph 9 of the statement of claim; but I must give the Defendant leave to amend his statement of defence in accordance with the facts, and I must deal with the case on the facts shewn on the affidavits. What will ultimately happen at the trial I shall not anticipate; but upon the facts as disclosed by these affidavits the case seems to be this. [His Lordship then examined the evidence as to what took place upon the occasion of the payment off of the mortgage money, and said that, inasmuch as there was a serious conflict of evidence between the various persons who took part in that transaction, he could not, under the circumstances, order *Burton* to pay the £2000 into Court. His Lordship then continued:—] The order must, therefore, be discharged; but as the whole difficulty has been created by the Defendant *Burton*, and the admission which he originally made is incorrect, he can only have the indulgence he asks of the Court upon payment of the whole costs of the motion.

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The order made was that the order of the 28th of March, 1892, should be discharged so far as it affected *Burton*, but that *Burton* should pay the costs of the application, and liberty was given to the Plaintiff to amend her statement of claim, and to *Burton* to amend his statement of defence and to file a further affidavit

in answer to the interrogatories; and liberty was given to the Plaintiff to administer further interrogatories to *Burton*.

The Plaintiff appealed. The appeal was heard on the 29th of June, 1892.

Buckley, Q.C., and *Colt*, for the appeal:—

We contend, that where, on the evidence before the Court, it is made out that money is in the defendant's hands, payment into Court may be ordered though there be not a distinct admission. In *Jervis* v. *White* (1) Lord *Eldon* says: "I think, I am at liberty in this case to fasten upon the affidavit of the defendant in answer; as Lord *Kenyon* did in *Vann* v. *Barnett* (2); where though it was held, that in general in such cases the Court will not deal effectively between the parties, till the answer comes in, yet if the defendant answers the affidavits, the Court will look at the affidavit as if it was the answer. This is not a distinct admission of a sum of money in the defendant's hands; but upon the two affidavits, and the defendant's having undertaken to give an explanation, he is in the situation, in which an executor very often is. The defendant must therefore on or before the last seal pay this money into Court, deducting what the plaintiff has received, and what he admits has been applied in the partnership debts, subject to an application for the whole or any part to be applied in discharge of the partnership debts, as the Court shall think proper. I go this length upon the ground of gross fraud." There the order was made on the balance of evidence, though, as Lord *Eldon* says, there was no clear admission. In *Freeman* v. *Cox* (3), the plaintiff having sworn to the money having come to the defendant's hands and the defendant not answering the charge, the money was ordered into Court. This case was approved in *Porrett* v. *White* (4) by the Court of Appeal, where money was ordered into Court because the defendant had not answered an affidavit stating the money to be in his hands.

[LOPES, L.J., referred to Order XXXII., rule 6.]

It is admitted that in the books of the firm they debit themselves

(1) 6 Ves. 738, 739.
(2) 2 Bro. C. C. 158.
(3) 8 Ch. D. 148.
(4) 31 Ch. D. 52.

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with this £2000, and discharge themselves by an entry that it was advanced on mortgage. But no such mortgage is produced.

[KAY, L.J.:—Must you not take the admission as a whole?]

The affidavit of *Burton* does not expressly deny that he himself received the money as *Jennings* deposes. The order for payment into Court was made upon admissions which clearly justified it, and when the Defendant comes to be relieved from that admission on fresh evidence, the Court may properly decide on the whole of the materials before it.

[LINDLEY, L.J.:—But the admission was conclusively shewn to have been wrong.]

We say that an admission in the pleadings is final, and that it ought not to be withdrawn. But if withdrawn, it ought only to be allowed to be withdrawn on the terms of payment of the money into Court. The Court has power to impose terms, and the amendment of the defence is vital to *Burton*, for on the pleadings as they stand he has no defence. When money is paid to a firm of solicitors and they do not produce a security on which it has been indorsed, it is to be treated as still in their hands: *Sawyer* v. *Goodwin* (1).

Hastings, Q.C., and *Gregory*, for *Burton*:—

[LINDLEY, L.J.:—We think that on the fresh evidence there is not enough of an admission to justify an order for payment into Court; but ought leave to be given to amend the defence except on the terms of payment into Court?]

The Judge below had a discretion as to imposing terms, and he considered that the only terms ought to be the payment of the costs of the application. The Court will not interfere with the exercise of his discretion. Under Order XXVIII., rule 1, an amendment will always be allowed which will bring out the true facts of the case if it can be done without injustice to the opposite party: *Tildesley* v. *Harper* (2); *Clarapede* v. *Commercial Union Association* (3).

[KAY, L.J.:—On such terms as the Court considers just.]

(1) 1 Ch. D. 351. (2) 10 Ch. D. 393.
(3) 32 W. R. 262.

It is not just that the Plaintiff should have the same advantage as if the admission in the defence stood. A clear admission is wanted to justify an order for payment into Court: *Hagell* v. *Currie* (1).

LINDLEY, L.J.:—

This is a very curious case, and we decide it on other grounds than those taken by Mr. Justice *Stirling*. If this had been a motion to pay money into Court, the principles to be applied are those on which Mr. Justice *Stirling* acted. There must be an admission in order that money may be paid into Court. That is the old well-settled practice in Chancery, and I am not aware that the *Judicature Acts* have in any way modified or affected it, except that if a motion can be made under Order XIV., money may be ordered to be brought into Court as the price of avoiding a judgment—an exception which has no bearing on the case before us, as it is not a case in which an application under Order XIV. could be made. Upon the evidence as it stands, which has been gone through very carefully by Mr. *Buckley*, we cannot come to the conclusion that there is such an admission by Mr. *Burton* as is requisite in order to justify an order upon him to pay money into Court; but that is not the question. This is an action by a *cestui que trust* against two gentlemen who are partners as solicitors for the recovery of trust money alleged to have been received by the firm. Mr. *Burton*, one of the partners and the only person with whom we need trouble ourselves, put in a defence, and put in an answer to interrogatories in which he admitted the receipt of the money by the firm; and upon that clear and plain admission, and on a like admission by the other partner, an order was made in the ordinary course of practice upon both partners to pay the money into Court. That was a perfectly valid order—an order which was perfectly right and proper on the materials before the Court. Mr. *Burton* comes to the Court and says: "Relieve me from that order. I made a mistake; and not only relieve me from that order, which is a small matter, but give me liberty to amend my defence, to withdraw my admission, and to fight the case."

(1) Law Rep. 2 Ch. 449.

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Now, upon what terms ought such permission to be given? Ought the only term to be upon payment of the costs of the application? It appears to me that would not necessarily be so. It might be so under some circumstances; but in considering what is fair and just between the parties when a person comes to set aside a valid order against him, we must see what the evidence is which he adduces, and the grounds upon which he alleges that he ought to have the relief which he asks. Now, when we look at the evidence, I do not say that we find a case of liability established against him, for to say that would be deciding the action, and perhaps other evidence may be forthcoming; but we find that a very strong case is made against him; and is it right under those circumstances to give him leave to reopen the whole matter and defend unconditionally? It appears to my Brothers and to myself that the discharge of the order made against him, and which was perfectly just, and the permission which he seeks to obtain, and which he is only entitled to upon terms, ought not to be granted except on the terms of his bringing the money into Court.

It is only due to Mr. Justice *Stirling* to say that this mode of looking at the case does not appear to have been fully presented to him or considered by him. The case appears to have been argued before him as if it were a mere question of bringing money into Court upon admissions. The case appears to us and is presented to us now in a totally different point of view, and our duty is to make that order which in our judgment the learned Judge in the Court below ought to have made. The order will be that upon payment of £2000 into Court within a time which we will arrange presently the order appealed from shall stand; but unless that money is paid, then the order ought to be discharged. Inasmuch as the view presented to us was not presented before Mr. Justice *Stirling*, we think the costs of the appeal ought to be costs in the action.

LOPES, L.J.:—

This is not an ordinary case of a motion to pay money into Court. Motions of that kind are common in the Chancery Division, but are not so well known in that branch in which I have

had experience. It is quite settled that to justify an order for payment into Court there must be an admission of liability, either on the pleadings or otherwise, and I do not think that in this case any such order could be made. I have carefully studied the evidence that has been brought to our notice, and, with a very willing mind to find it, I cannot extract from that evidence any such admission as would justify an order that this money should be paid into Court. I think that *Freeman* v. *Cox* (1) has gone as far in favour of extracting an admission out of documents and conduct as any case ought to go. Whether or not I myself should have gone so far is immaterial; all I say is, that I think that case has gone to the very utmost extent to which the doctrine of implied admission can be carried. But this case, as I have said, is a very different case from an ordinary application to order a party to pay money into Court. Here originally there was an admission which clearly justified the order for payment into Court, and an order was made in consequence of it. Subsequently the Defendant *Burton* says he has discovered that he had made a mistake, and that his admission ought never to have been made; that he had subsequently investigated the matter, and found that what he had admitted was not the fact. Thereupon he applied to the Judge to set aside that order and to give him leave to amend the pleadings. The learned Judge set aside the order for payment into Court, and gave the Applicant leave to amend his pleading. Now, it appears to me that the learned Judge was perfectly right in permitting the pleadings to be amended, and in setting aside the order for payment into Court; but, having regard to all the facts that have been brought before us, I think he ought to have imposed the terms that *Burton* should not only pay the costs of the application, but should bring the £2000 into Court. I think, therefore, that this appeal must be allowed, and an order made to the effect stated by Lord Justice *Lindley*.

KAY, L.J.:—

The Lord Justice *Lindley* has so exactly expressed my view of this matter that I need not add many words; but I wish to say

(1) 8 Ch. D. 148.

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something upon the general question of the practice as to ordering payment of money into Court. Where a claim is brought forward which is *bonâ fide* contested by the defendant, and which may, or may not, according to the result of the trial, have the effect of obtaining a judgment against the defendant for payment of the money, it never has been the practice at law or in equity that the plaintiff should upon a contest of affidavits obtain payment of that money into Court before the trial. It would be a monstrous thing, where *A.* brings an action against *B.* claiming from him a sum of money, whether large or small does not matter, that *B.*, contesting the whole of the claim and protesting that no money whatever is due from him, should be ordered before the trial to pay the amount into Court. Nobody ever heard of such a thing, either at law or in equity. The only case in equity where money is ordered into Court is where the defendant by his pleading, or by some affidavit, or in one or two cases—there are but two that I know of—by some admission made before action—that is, by letters written by himself—has admitted that a certain amount of money claimed—it may be the whole or less than the whole—is actually in his hands. Where there is an admission of that kind, then the Court has for many years been in the habit of directing a defendant who has made such admission to pay that amount into Court—not that it decides the case against him, but it orders him to pay that money (which he admits is in his hands, and which the admission shews is really money upon which the plaintiff has a claim) into Court to abide the result of the action, and the Court has never really gone further than that. It never has been the practice of the Court of Chancery up to this time that a plaintiff making a claim of that kind, and not obtaining such an admission, can, by filing affidavits against the defendant, obtain payment of the money into Court, unless the defendant is foolish enough to answer such affidavit, and in the affidavit in answer makes an admission. It is possible that then you might get an order for payment of the money into Court. The case must be brought up at least to that. It must be not a mere contest upon affidavits as to whether the money is due or not, but there must be an admission by the man against whom the order is made.

Now, that that is the rule, and always has been the rule, cannot be shewn more clearly than by the early part of the judgment of the late Master of the Rolls in *Freeman* v. *Cox* (1). He says: "In *Boschetti* v. *Power* (2) Lord *Langdale* observed: 'The Court cannot on motion order money to be paid or stock transferred into Court, unless it has a distinct admission of the defendant, that the money is in his hands or that the stock is in his name.' The new Orders have no reference to such a case. I will therefore make a precedent." I am not for a moment meaning to say that the precedent which he made in the particular case before him may not have been perfectly right; but if it means that in every case where a plaintiff files an affidavit, there being no admission whatever by the defendant, and the defendant declines to answer that affidavit, that is to be taken as an admission on which money may be paid into Court, all I can say is that I should not follow such a precedent. I do not believe there is any such practice, and I think a practice of that kind would be a very dangerous one. Further, this case really is not within that authority in any kind of way. Here we have not got an affidavit which the defendant does not answer, even if that were enough, and I do not think that it would be enough.

The only other case in which money can be ordered to be paid into Court by a defendant is a case falling under Order XIV. Under Order XIV. you must have two things: first of all, you must have a special indorsement of the writ, which can only be in certain cases; and next, you must, by the very terms of the order, have an affidavit by the plaintiff supporting the case made by the writ. Order XIV., rule 1, is: "Where the defendant appears to a writ of summons specially indorsed, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a Judge for liberty to enter final judgment." In that case the defendant may apply for leave to defend, and it is a matter of discretion whether the Judge should give that leave to defend, or, if he does, what terms he will impose. I apprehend that if the Judge thought

(1) 8 Ch. D. 148, 149. (2) 8 Beav. 98.

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there was considerable doubt about whether the money was due, he would not order it to be paid into Court as a condition of giving leave to defend. It is a matter of discretion. If he does order the money to be paid into Court, it is, I presume, because some *primâ facie* case is made against the defendant. The present is not a case coming within Order XIV., and upon the whole of the affidavits here, which we have all very carefully considered, there is nothing like an admission that this money is due. The case is an extremely peculiar one, as has been pointed out. There was originally an admission by the Defendant in his defence, and also in his sworn answer to interrogatories, upon which an order to pay the money into Court was inevitable, and was made. Then he finds out, or thinks he finds out, that his admission is wrong, and he moves to discharge that order. On the motion he produced evidence to shew that his admission, which was that the money had been paid to his co-partner *Jennings*, and by the co-partner had been paid into the bank, was a mistake; and he proves to the satisfaction of the Court that, whether the firm received the money or not, it did not go into the bank. Then he further attempts to shew that the firm never received the money at all, and upon that part of the case his evidence is not positive. I do not wish in the least to prejudge the case; but it is quite plain, however carefully you study these affidavits, that he has to meet at the trial a very serious claim. If the money went into the hands of the firm in any way—if it was used by the firm, of course the Defendant *Burton* has a very serious case to meet at the trial. At the hearing of this matter before the Judge, *Burton* did not ask simply that the order might be discharged, but he went on to ask, although his notice of motion did not ask it, that he might amend that defence and withdraw the admission he had made in his answer to interrogatories. The Court gave him leave, and, therefore, we may treat it as though that had been part of his notice of motion. The order under appeal not only discharges the order in Chambers, but it also gives him leave to amend his defence and to withdraw the admission he had made. Now, what position would he have been in at the trial if he had not had that leave? It seems to me that it would have been almost

inevitable that judgment should have gone against him on his admission; and therefore he has the leave given to him not merely to put in affidavits and withdraw the admission he had first made, but to withdraw it for all purposes of this trial, to amend his defence, and raise on the trial of this action all such defences as he possibly can raise. Surely it is not too much to say, "For such indulgence as that you must pay a price." To my mind, it appears probable that if it had been put to the learned Judge in that way he would have seen that it was necessary to impose upon him more stringent terms than he did. He did impose upon him the terms of paying the costs of the application for leave to discharge the order. That was quite right and inevitable; but was that enough? I confess it seems to me that it was not enough. I cannot doubt that if the matter had been presented to the learned Judge in that way he would have said: "As you are asking for all this indulgence—and you really will be exceedingly embarrassed, to say the least of it, at the trial unless I grant it to you—I must impose upon you, as the price of so great an indulgence as that, the terms that you must pay the money into Court." In that respect, and for those reasons, I agree entirely with the other Judges of this Court, and think that the order must be made as they have suggested.

Solicitors for Plaintiff: *E. F. & H. Landon.*
Solicitor for *Burton*: *W. Brewer.*

H. C. J.

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May 21, 27, 28; July 22.

LONDON ASSOCIATION OF SHIPOWNERS AND BROKERS *v.* LONDON AND INDIA DOCKS JOINT COMMITTEE.

[1891 L. 215.]

Dock Company — Statutory Powers—Regulations—By-laws—Confirmation—Ultrà vires—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *ss.* 23, 33, 83, 84, 85 [*Revised Ed. Statutes, vol. x., pp.* 89, 91, 101] *—Practice—Action by Individual—Special Damage—Public Injury—Declaratory Judgment—Consequential Relief—Rules of Supreme Court,* 1883, *Order* XXV., *r.* 5.

A dock company having, under its special Act and sect. 83 of the *Harbours, Docks, and Piers Act,* 1847, power to make regulations and by-laws, issued a compulsory code of regulations for shipowners using the docks; but these regulations were not confirmed as "by-laws" in manner prescribed by sect. 85 of the general Act. Certain accommodation provided for by the regulations, such as the appropriation of particular berths at the option of any shipowner upon certain specified terms, were in excess of what was required by statute to be provided by the dock company, and certain rates and charges imposed by them were beyond the company's statutory powers. A firm of shipowners which, prior to the issue of the regulations, had been in the habit of using the docks and having particular berths appropriated for their ships, finding that the terms imposed by regulations for such accommodation caused them inconvenience and increased expense, brought an action, by themselves as individuals, against the dock company, for a declaration that the regulations were altogether invalid until confirmed as required by statute, and also an injunction by way of consequential relief; a trade protection association of shipowners, of which the firm and other shipowners were members, but which owned no ships themselves, being made co-Plaintiffs. *A. L. Smith,* J., having, on the trial, dismissed the action with costs, the Plaintiffs appealed. At the hearing of the appeal, the Plaintiffs abandoned their claim for the injunction, and asked for the declaration only:—

Held, (1.) that the Plaintiff association had no *locus standi,* not being themselves shipowners, and not being entitled to sue as agent for their members; and (2.) that the Plaintiff firm, suing as individuals, and not by the Attorney-General as representing the public, were bound to prove special damage by the issue of the regulations, and that this they had failed to do, inasmuch as any accommodation provided by the dock company beyond the statutory requirement must be a matter of agreement between the firm and the dock company; but, under Rules of Supreme Court, 1883, Order XXV., rule 5, a declaration was made, notwithstanding the abandonment of the claim for consequential relief, that the regulations, not having been confirmed as by-laws, as required by statute, were not

binding on the Plaintiff firm save so far as they agreed to be bound by the same; and that they were not entitled to have berths appropriated to their ships, or any other special accommodation or conveniences, except upon such terms as might be agreed on between them and the dock company.

Appeal from *A. L. Smith*, J., dismissed without costs.

THIS was an appeal from a judgment of Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer*.

The action was brought by the *London Association of Shipowners and Brokers, Limited*, and the *Peninsular and Oriental Steam Navigation Company*, a member of the Plaintiff association, against the *London and India Docks Joint Committee* and the *London and St. Katharine Docks Company*, for a declaration that certain regulations issued by the Defendants, the Joint Committee, who were the managers of the undertaking of the Defendants, the *London and St. Katharine Docks Company*, consisting of eight *London* docks, including the *Royal Albert Dock*, were invalid until confirmed in the manner prescribed by the *Harbours, Docks, and Piers Clauses Act*, 1847; also for an injunction restraining the Defendants from enforcing, or requiring the Plaintiffs to comply with, such regulations until so confirmed.

The Plaintiff association was a limited company incorporated under the *Companies Acts*, 1862 to 1890, for the object, among others, of protecting shipping and maritime interests, especially in regard to the regulation, management, customs, and usages of the port of *London*, and of the docks, warehouses, wharves, and Custom House therein. The association was, in short, a trade protection society, having no ships or goods of its own, but comprising among its members individuals and companies who, like the Plaintiffs, the *Peninsular and Oriental Company*, were shipowners using the Defendants' undertaking.

The Plaintiffs, the *Peninsular and Oriental Company*, had for several years been in the habit of using, for their fleet of steamers, the *Royal Albert Dock*, which was of a large size and suitable for the steamers, and in which certain berths and quay accommodation were appropriated for them. Until a recent date that company, as well as other shipowners using the various docks, had been in the habit of loading their ships themselves,

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the unloading, however, being done by the dock companies (or the *London and St. Katharine Docks Company*, with whom they became amalgamated), who provided the necessary labour for the purpose; but, in consequence of a strike that occurred in August, 1889, among the dock labourers, this system was altered by throwing upon the shipowners the work of unloading, as well as loading, the vessels themselves. To carry out the alteration the Defendants, the Joint Committee, in December, 1890, issued a printed code of regulations, dated the "1st of January, 1891," which were intended to apply to all vessels entering the Defendants' docks after the 1st of January, 1891; but their coming into operation was subsequently postponed till the 1st of February, 1891, when they were put into force against all ships using the docks. The code of regulations was published in the form of a pamphlet, the outer page being headed, "*London and India Docks Joint Committee*," and, underneath, "Rates on shipping using the eight docks" (naming them, including the *Royal Albert Dock*). Then, "The attention of captains of vessels is especially directed to the regulations regarding fires, lights, and smoking, as well as to the penalty for any breach thereof"; and then the following notice: "Notice.—The Joint Committee will not be answerable for any delay, loss, or damage arising from combination or strikes of any persons in their employment or service, nor for any consequences arising therefrom."

The pamphlet contained tables of rates on shipping using the docks, which were entirely under the control and management of the Joint Committee, and then a number of regulations, headed "Discharge of Vessels," regulation 1 being as follows: "Shipowners will be required to comply with the following regulations, and the regulations of H. M. Customs, of the Fire Insurance Offices, and of the Joint Committee, from time to time made."

Regulation 2 was as follows: "For the convenience of shipowners wishing to have a particular berth appropriated to them, at which they shall discharge their vessels, the Joint Committee will, during their pleasure, and upon application, appropriate a berth, including the use of specified quay and shed space, at the rate of 2*s.* 6*d.* per square yard, of quay and shed space, per

annum, or such other rate as may from time to time be made. Vessels having such fixed berths will also have assigned to them, as far as practicable, suitable loading berths."

The remaining regulations, stating the terms and conditions with which shipowners using the docks and quays were required to comply, were of a very stringent and peremptory character; some of them relating to special accommodation and facilities, such as the appropriation of berths, and others purporting to bind all shipowners, and not only those who desired special accommodation. The pamphlet concluded as follows: "Under authority given by Acts of Parliament, the schedule of Rates is subject to revision from time to time.—By order. *Dock House, 109, Leadenhall Street, E.C.*"

These regulations had never been confirmed as "by-laws" in the manner prescribed by the *Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 Vict. c. 27).

The Plaintiffs, and in particular the *Peninsular and Oriental Company*, complained that the terms imposed by the regulations upon shipowners desiring appropriated berths caused them great inconvenience, and also increased responsibilities and liabilities, and they eventually brought this action, as above stated.

The question in dispute was whether these regulations were within the statutory powers vested in the Defendants, the Joint Committee; the Plaintiffs asserting in their statement of claim that the regulations, not having been confirmed as prescribed by statute, were invalid and void: the Defendants, on the other hand, insisting, in their statement of defence, that the regulations contained the terms upon which the Defendants were willing to afford certain facilities to owners of ships using the Defendants' undertaking, and afforded notice to such owners of such terms, and were not by-laws within the meaning of the *Harbours, Docks, and Piers Clauses Act*, 1847. The Defendants further insisted that the statement of claim disclosed no cause of action, and that the Plaintiff association had no *locus standi* as Plaintiffs.

The Defendants, the *London and St. Katharine Docks Company*, being an amalgamation of previously existing dock companies, were incorporated by a special Act, the *London and St. Katharine*

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Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), which incorporated the general Act, the *Harbours, Docks, and Piers Clauses Act*, 1847.

The Defendants, the Joint Committee, were a corporate body, created by the *London and St. Katharine and East and West India Docks Act*, 1888 (51 & 52 Vict. c. cxliii.), for the purpose of working the eight docks as one undertaking; and, under that Act and the several other special Acts relating to the docks, and also of the general Act, they were empowered to impose rates and charges and make by-laws and regulations subject to certain restrictions. It appeared, however, that some of the accommodation and facilities provided for by the regulations, and especially the provision for appropriating particular berths, were in excess of those required by statute to be supplied by dock companies, and also that several of the rates and charges imposed were beyond those permitted by statute.

The action came on, in the first instance, before Mr. Justice *North*, upon a motion by the Plaintiffs for an interlocutory injunction; but his Lordship refused the motion. The action came on for trial before Mr. Justice *A. L. Smith* (sitting for Mr. Justice *Romer*), on the 20th, 22nd, and 23rd of February, 1892, *vivâ voce* evidence being called on behalf of the Plaintiffs; but at the close of the Plaintiffs' case, his Lordship held that the evidence in no way altered the case as heard upon the motion for injunction, and that Mr. Justice *North* had, upon the motion, virtually decided the question of the validity of the regulations.

The action was accordingly dismissed with costs.

The Plaintiffs appealed.

The appeal was heard on the 21st, 27th and 28th of May, 1892. The Appellants' counsel stated that they would not press for the injunction claimed, but would be content with a declaration, and liberty to apply.

The several regulations and the sections of the special and general Acts discussed in the course of the arguments are sufficiently stated in the judgments of the Court of Appeal.

Sir *R. Webster*, A.G., *Chadwyck Healey*, Q.C., and *T. E. Scrutton*, for the Appellants.

Sir *C. Russell*, Q.C., *Finlay*, Q.C., *F. W. Hollams*, and *G. S. Barnes*, for the Respondents.

Sir *R. Webster*, in reply.

In the course of the arguments, *Pinchin* v. *London and Blackwall Railway Company* (1); *Doherty* v. *Allman* (2); *Gosling* v. *Veley* (3); *Burder* v. *Veley* (4); Rules of Supreme Court, 1883, Order XXV., rule 5; Order XVI., rule 11; and the various statutory enactments referred to in the judgments, were cited.

1892. July 22. LINDLEY, L.J.:—

This is an appeal by the Plaintiffs from a judgment of Mr. Justice *A. L. Smith* dismissing the Plaintiffs' action with costs. The object of the action and of the appeal is to obtain a declaration to the effect that a new code of regulations made by the Defendants, and dated the 1st of January, 1891, is invalid, and in excess of the Defendants' statutory powers. The Plaintiffs also seek to obtain an injunction to give effect to such declaration; but their counsel stated that they would be content with a declaration and liberty to apply, and that an injunction was a matter of comparatively small importance. The Defendants maintain that their so-called regulations are not and cannot fairly be taken to be rules binding on any one who does not agree to observe them. The Defendants further contend that even if the public have a right to complain of the regulations as made by the Defendants in excess of their statutory powers, yet that the Plaintiffs do not represent the public and suffer no special damage, and are not entitled to maintain the action.

Such being the general nature of the controversy, it becomes necessary to consider—(1.) The true nature of the regulations which have given rise to this controversy; (2.) The authority of the Defendants to make them; (3.) Their legality or illegality; (4.) The position of the Plaintiffs and their right to maintain an action in respect of them.

1. As to the nature of the regulations themselves. They are

(1) 5 D. M. & G. 851.
(2) 3 App. Cas. 709, 720.
(3) 7 Q. B. 406, 451; 12 Q. B. 328, 391.
(4) 12 Ad. & E. 233, 265, 303.

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contained in a pamphlet, on the title-page of which is this: "*London and India Docks Joint Committee.* Rates on Shipping;" then follow, "Using the (various) docks"; then, "The attention of captains of vessels is especially directed to the regulations regarding fires, lights, and smoking, as well as to the penalty for any breach thereof." Then follow five pages headed "Dues and Rent on Shipping." Then come a number of paragraphs headed "Discharge of Vessels," and numbered 1 to 18. Some of these impose rates and charges, others do not. These eighteen paragraphs are followed by some more paragraphs with various headings, and imposing charges. Then come some regulations headed "Labour in Docks." Then come these words: "Under authority given by Acts of Parliament, the schedule of rates is subject to revision from time to time." Last of all there are printed in large letters, "By Order, *Dock House*, 109, *Leadenhall Street, E.C.*"

It is impossible to read this new code, and especially the paragraphs 1 to 18, without coming to the conclusion that the Defendants who issued the code intended its contents to be understood, and that those who would read them would understand them, or the bulk of them at any rate, as rules or orders to be obeyed and as imposing charges which must be paid apart from any agreement to that effect. No one reading the code would regard the regulations and charges simply as terms offered for acceptance by those who might use the docks to which the code relates. There is nothing optional in the wording of paragraph No. 1, "Shipowners will be required to comply with the following regulations, &c., &c.;" and the same imperative tone runs through the whole. I am not now discussing the reasonableness or unreasonableness of the regulations or of the charges: their character in that respect does not affect their authoritative tone. I cannot regard them as anything short of rules or orders and charges emanating from and imposed by the Defendants, and made by them in the exercise of some authority claimed by them under their statutory powers.

2. I pass, therefore, to the consideration of the authority of the Defendants to make such regulations and charges. The Defendants, the *London and St. Katharine Docks Company*, are

merely the owners of the docks. The regulations and charges are made and imposed by the Defendants, the *London and India Docks Joint Committee.* This Joint Committee is a corporate body created by the *London and St. Katharine and East and West India Docks Act,* 1888 (51 & 52 Vict. c. cxliii.), for the purpose of working eight large docks in *London* as one undertaking (see the Preamble and sects. 4, 9, and 10). The powers of the Joint Committee are enumerated in sect. 31, and are, shortly, the same as those which were previously vested in the *London and St. Katharine Docks Company* and the *East and West India Dock Company* respectively. These dock companies were, and indeed continue to be, the owners of the docks alluded to, some of the docks belonging to one company and some to the other. The dock which is more particularly in question in this action is the *Royal Albert Dock,* belonging to the *London and St. Katharine Docks Company.* Whatever regulations this company could have made for the use of that dock can now be made by the Joint Committee. Sect. 57 authorizes the Defendants to make the same tonnage rates on vessels using the docks of the *London and St. Katharine Docks Company* as the *East and West India Dock Company* were empowered by sect. 25 of their Act of 1882 to make. The power of the Defendants to make regulations for the use of the *Royal Albert Dock* and of the other docks belonging to the *London and St. Katharine Docks Company* must be sought for in that company's special Act of 1864 (27 & 28 Vict. c. 178), and in the *General Harbours, Docks, and Piers Clauses Act,* 1847 (10 & 11 Vict. c. 27), which is incorporated in it. Under these two Acts the public have certain rights to use the docks, including the wharfs, quays, and warehouses, and the company are empowered to make by-laws and regulations and charges for their use.

The rights of the public to use the docks, including the wharfs, quays, and warehouses, all of which it must be borne in mind belong to the company, are conferred by sects. 2 and 33 of the general Act. Sect. 2 is the definition clause, and by it the expression "harbour, dock, or pier" means "the harbour, dock, or pier, and the works connected therewith, by the special Act authorized to be constructed." These works, I apprehend,

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include the quays, wharfs, and warehouses, all of which are constructed under the powers of the special Acts, and are essential to the use of the harbours, docks, and piers more especially mentioned in them. This was certainly the case with the warehouses constructed under the powers of the *Victoria (London) Docks Act*, 1853 (16 & 17 Vict. c. cxxxi.), s. 28, which is set out in the 4th schedule to the special Act of 1864 (page 2396 of the Queen's printers' copy). Moreover, the expressions, "the *London Docks*," "the *St. Katharine Docks*," and "the *Victoria Docks*," are expressly declared by the 5th section of the special Act, 1864, to mean and to include, *inter alia*, warehouses, wharfs, and quays; and it is very difficult to read that Act and the general Act together without attributing the same meaning to the word "docks," which constantly occurs in both.

Sect. 33 of the general Act of 1847 entitles the public to use the harbour, dock, and pier as defined in sect. 2 for shipping and unshipping goods and embarking and landing passengers; but this right of user is subject to the payment of the rates made payable by the general and special Acts, and is subject to the other provisions thereof, that is, of both Acts. These other provisions include those specially relating to warehouses, as well as those relating to by-laws and regulations, all of which will be examined presently.

The special Act is silent as regards the rights of the public, except that by certain former Acts referred to in Sched. IV., and not repealed, the docks of the company are to be deemed to be situate in and part of the port of *London*, and that the rights and privileges which belong to that port extend to these docks; and the company's quays and wharfs are made legal quays and wharfs within the same port: see 9 Geo. 4, c. cxvi., ss. 112, 113, page 2368 of the Queen's printers' copy; 6 Geo. 4, c. cv., ss. 92, 93, p. 2389; 16 & 17 Vict. c. cxxxi., s. 49, p. 2397.

The powers of the company to regulate the use of the docks, quays, and warehouses, and to make charges for their use, depend partly on the fact that the company is the owner of them and partly on the fact that the company's rights as owner are largely governed by special provisions rendered necessary for the protection of the public. Subject, however, to the restrictions

expressly or impliedly imposed by statute, the company can exercise the ordinary rights which are incidental to the ownership of their docks, quays, and warehouses. As owner, the company could make any regulations it might think proper for the use of its property; it could charge what it liked and could shut its docks altogether if people would not comply with its demands. These powers, however, are not unchecked by statute. The Legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorized to acquire land for such purposes cannot, I think, admit of any doubt.

Bearing this observation in mind, let us see what powers are expressly conferred upon the company by statute.

It will be found necessary to distinguish the power of imposing rates and charges from the power to make regulations or by-laws; and it will be convenient to consider the last power first. The general Act of 1847 expressly enables the company to lease for not more than three years, or grant the use or occupation of its warehouses, buildings, wharfs, yards, cranes, machines, and other conveniences on such terms as shall be agreed upon between the company and the persons taking the same (sect. 23). This section is a clear instance, not of an enabling, but of a restrictive clause; it is necessary, not to enable the company to make agreements with respect to the use of its own property, but to enable it to derogate from the rights which the public would otherwise have over that property. Sect. 23 limits the rights which the public could otherwise claim under sect. 33, and enables the company to set apart, for the exclusive use of an individual, part of the property which the public would otherwise have a right to use. The power conferred by sect. 23

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cannot, however, be properly used to force any person to come to terms with the company for the use of any property which the public has a right to use on terms applicable to all persons alike.

The clauses relating to the powers of the harbour-master and to various offences by persons using the docks, &c., may be passed over as irrelevant to the present inquiry. Sect. 83 enables the company to make by-laws under its common seal for a great variety of purposes which may be summarized as for the use of its docks and property. Penalties may or may not be imposed for infringements of the by-laws (sect. 84), but no by-laws (except such as relate solely to the company or their officers or servants) have effect unless confirmed as required by sect. 85. Moreover, notices have to be given before they are confirmed (sects. 86, 87), and when confirmed they have to be published as directed by the Act (sect. 88). When duly made, confirmed, and published, the by-laws become binding on all parties (sect. 89), and they can only be altered by other by-laws similarly made and confirmed.

This power of making by-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it. A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "by-laws," whether they be valid or invalid in point of law; for the term by-law is not restricted to that which is valid in point of law. The exception in sect. 83 and sect. 85 warrants the use of the word "by-law" in the sense of a regulation binding only on the company, its officers and servants; but these same sections shew that a by-law in this more limited sense can be made and unmade at the will of the company, and requires no confirmation and publication. This double use of the word "by-law" is apt to create confusion, and is perhaps to be accounted for by a desire to make use of one term for all regulations for a breach of which penalties may be imposed under sect. 84.

The company's special Act of 1864 also contains a power to make by-laws (see sect. 113). This is a more detailed power than that conferred by the general Act, and relates not only to the use of the docks, but also to the management and conduct of the business and affairs of the company, to the management of its warehouses, and various other matters for which, however, fresh power was hardly necessary, considering that the general Act was incorporated in the special Act. The special Act is silent as to the mode of making by-laws; they must therefore be made as directed by the general Act.

Sect. 99 of the special Act directs the company, in accordance with and subject to its regulations in that behalf, to afford to merchants and others entitled to or having charge of any goods deposited in or upon any of the warehouses, sheds, wharfs, quays, or premises of the company, proper and sufficient access to the goods so deposited. The use of the word "regulations" in this section is perplexing. The by-law sections enable the company to make by-laws to the same effect as any regulations which can be made under this section; and I am by no means clear that by "regulations" in sect. 99 are meant anything different from by-laws. The object of the section is not to enable the company to make regulations, but to compel the company to afford proper access to goods on their premises subject to proper regulations. The power to make such regulations must be sought for elsewhere. They must necessarily affect merchants and other persons besides the officers and servants of the company; and I can find no power to make regulations, as distinguished from by-laws, for the conduct of any persons other than the company, its officers and servants. Even regulations for the conduct of the company's officers and servants are called "by-laws" by the general Act, although they do not require confirmation or publication. Assuming however, that sect. 99 refers to some regulations which are not by-laws, they are confined by this section to the access to goods on the property of the company. By no legitimate process of construction or inference can sect. 29 be stretched so far as to justify such rules and regulations as are in controversy in this action.

The only remaining sections to which it is necessary to allude

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are those which relate to the power of levying tonnage and other rates on ships and goods. The general Act of 1847 does not contain any clause authorizing the imposition of rates; but it contains several (viz., sects. 25 to 50) relating to the payment and collection of such as may be authorized by special Acts. The most important of these are sects. 30, 46, and 47. Sect. 30 enables companies to vary their rates, provided they do not exceed the maximum sums mentioned in the special Acts, and provided all persons are charged alike; sect. 46 provides for the settlement of disputes by justices; sect. 47 provides for the publication of tables of the rates payable.

The authority for imposing tonnage rates on ships entering the docks of the Defendants is conferred by sect. 57 of the special Act of 1888, which apparently replaces sect. 132 of the special Act of 1864. The section relating to rates on goods is sect. 134 of the last-mentioned Act, and this section authorizes the company to levy rates on goods brought into or landed, or deposited within, or delivered, or shipped from the docks and works for and in respect of their wharfage, unshipping, landing, relanding, piling, housing, weighing, coopering, sampling, unpiling, unhousing, watching, shipping, loading and delivering, and generally in respect of any work to be performed in respect of the goods. Tables of these rates are to be made and printed and published as directed by the section. The tonnage rates on ships and the import and export rates on goods must not exceed the maximum amounts fixed by statute (see, in addition to the sections in the general Act of 1847, already noticed, sect. 57 of the Act of 1888 and the provision in sect. 134 of the Act of 1864); but the only limit to the other rates is that they must be reasonable (see sect. 134 of the Act of 1864). It is to be observed that the power to make rates is distinct from, and in addition to, the power to make by-laws. By-laws are not necessary for the imposition of rates; nor, indeed, do the by-law sections authorize their imposition. The rates may be varied from time to time.

3. Having ascertained the powers of the Joint Committee, it remains to consider the legality or illegality of the provisions of the new code. First, I will take the rates and charges by themselves. The tonnage and other rates on ships are not disputed,

and may be passed over. The rates mentioned in regulations 2 and 3 are not rates on goods within the meaning of sect. 134 of the Act of 1864; nor can they be imposed by authority under sect. 23 of the general Act of 1847, which relates to letting on terms to be agreed upon. The rates in 2 and 3 can only be defended, if at all, on grounds which will be further considered presently. The rate of 1*s.* 6*d.* per ton in regulation 10 is not authorized by sect. 134 of the Act of 1864, for that section applies to rates payable to the dock company and not to rates payable by it. The rates mentioned in regulations 13, 14, 15, 17, and 18 are not quarrelled with, although other parts of some of these regulations are. The regulations contained in the code are not binding as orders, rules, regulations, or laws. Imperative in form, they bind no one to obedience. They are not, and do not purport to be by-laws; but no other orders, rules, or regulations made by the Defendants can be binding simply as orders, rules, or regulations. They may, of course, be expressly or impliedly assented to, and so become binding by agreement. But an agreement is one thing; a regulation which has to be obeyed, whether assented to or not, is quite another thing; and these regulations can only be regarded as binding on those persons who in fact assent to them and agree to conform to them. It is said that there never have been any by-laws for the regulation of the docks. That is, however, to be accounted for by the fact that until the new code came into force the dock authorities themselves did all the work in the docks, except loading outgoing ships. Under those circumstances no one cared to test the legality of the regulations. When, however, the practice was changed and the shipowners unloaded their own ships, and when the dock authorities sought to force them to do a great deal more than discharge their own cargoes, regulations which previously had produced no inconvenience became galling, and their legality was naturally questioned, and, being questioned, must be decided.

The great dispute turns on regulation 2, and the terms on which shipowners are entitled to have berths appropriated to their ships. I can find nothing in the statutes relating to these docks which entitles any shipowner to demand that a particular berth shall be kept for him; nor is there anything which

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entitles the dock company to make any special charge for such a convenience, if granted. Under these circumstances, if the convenience has been enjoyed and a dispute arises about the terms of payment, a Court of Law must decide in each particular case—first, whether the shipowner who has had a berth kept for him has agreed to pay the rate demanded; and, secondly, if not, then what is a reasonable price for the accommodation which he has enjoyed. This is the view contended for by the Defendants, and so far they are right. For similar reasons the Defendants are right as to all those regulations which refer to special accommodation and facilities, viz., 4, 13, 14, 15, 17, and 18. The real truth is that shipowners who want special accommodation cannot force the Defendants to give it them, even on payment of reasonable compensation. Special accommodation must be made the subject of special agreement. Regulation 2 contains the pecuniary terms on which the Defendants are willing to give the accommodation; the other terms are in the other regulations. If the Plaintiffs will not assent to those terms, the Defendants can refuse the special accommodation. The effect of this, no doubt, may be to drive the Plaintiffs to other docks in other ports where more favourable terms can be made, if any such can be found. The only safeguard against this is the Defendants' own view of their own interests.

Regulation 3 is also quarrelled with, but it is not open to the remarks made on regulation No. 2, for regulation 3 does not apply to cases in which exceptional facilities are afforded. The first part of regulation 3 is unobjectionable; it is a mere notice that the dock-master's orders as to berths must be obeyed. The second part, however, is not warranted by any statutory enactment. It is an attempt by the Defendants to force shipowners to pay for what they do not want, and to compel them to hire quay and shed space in order to do work formerly done by the dock company, and which the shipowners object to have forced on them. This must be taken in conjunction with regulations 9 and 10, which purport to bind all shipowners, and not only those who desire special accommodation.

For reasons already given, I am of opinion that these regulations can only be made binding by being passed and confirmed

as by-laws, although, of course, those persons who choose to agree with them may do so, and may thus become bound by them. The same remark applies to all the other regulations not confined to special accommodation and special facilities which the dock company are not bound to afford, that is, to all the regulations except Nos. 2, 4, 13, 14, 15, 17, and 18, which do relate only to special accommodation and facilities. The general Act of 1847 contains a section (22) binding the company to supply cranes and labourers to work them. But regulation 14 applies to specially large cranes, and not to such as the company is bound to supply under the section to which I have referred.

4. I come now to the last head, viz., the position of the Plaintiffs and their right to maintain this action.

The *London Association of Shipowners and Brokers, Limited*, is a trade protection society. It has no ships or goods of its own. Its members have, and it really sues on their behalf. But the society itself is only their agent, and this is not a case in which an agent can sue in his own name. This society, therefore, has no *locus standi*. This objection is purely technical, for any one of the members of the society can sue on behalf of himself and other shipowners in the same interest; and an action so constituted would be free from objection in point of form. Liberty to amend might probably have been obtained if applied for in time. It is too late, however, now to amend in this respect.

The other Plaintiffs are the *Peninsular and Oriental Steam Navigation Company*, an incorporated company owning a large fleet of steamers using the Defendants' docks. The *Peninsular and Oriental Company*, if aggrieved by the Defendants' regulations, have a clear *locus standi* as Plaintiffs in an action brought to have its grievances redressed. At the same time the *Peninsular and Oriental Company* is not like the Attorney-General, and is not entitled to sue on behalf of the public for the purpose of preventing the Defendants from exceeding their statutory powers irrespective of any particular injury to any particular individual. The *Peninsular and Oriental Company* must shew that it is itself aggrieved before it is entitled to any declaration or relief in an action brought by itself. Had this action been an information by the Attorney-General, there would be no difficulty in

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declaring the regulations complained of not to be binding on the public, and in granting an injunction to restrain the Joint Committee from enforcing them; for I regard the new code as an imposition on the public. The difficulty in the way of the *Peninsular and Oriental Company* maintaining this action is as follows: the *Peninsular and Oriental Company* always, in fact, requires berths to be appropriated to its ships, and the *Peninsular and Oriental Company* is not concerned with and is not affected by regulations which relate to the owners of ships not having fixed discharging berths. As regards appropriated berths, the terms on which they can be had in future must be settled by agreement, and the company has nothing to complain of in point of law; and, as to the past, the company must pay, either the sum demanded, or such a reasonable sum as may be determined in one or more actions brought for determining that particular question in the case of each ship to which a discharging berth has in fact been appropriated.

On these grounds it is contended that no right of the *Peninsular and Oriental Company* has been infringed, and that this action is not maintainable by the *Peninsular and Oriental Company*. The only answer to this contention is as follows It is true that the *Peninsular and Oriental Company* always has required berths to be appropriated to its ships, and will in future find it very inconvenient not to have such berths; but the company is entitled to have unappropriated berths unfettered by legal restrictions, and is entitled to exercise its option to have such berths, or to have appropriated berths on terms which may be agreed upon. The Joint Committee has deprived the company of its rights in this respect, and offer the company an alternative which the Joint Committee has no right to insist upon, and consequently the *Peninsular and Oriental Company* is aggrieved by the alternative presented to it; because, if it could have unappropriated berths, subject only to proper by-laws, it might prefer them, with all their inconveniences, to appropriated berths on the terms insisted on by the Joint Committee. This argument would, in my opinion, be a sufficient answer to the technical objection that the *Peninsular and Oriental Company* has no sufficient interest in the suit, if the *Peninsular and Oriental*

Company did in truth want unappropriated berths; but it does not. The company is not claiming the option suggested, and does not care to have it. The *Peninsular and Oriental Company* claims appropriated berths on terms which the Joint Committee will not concede. The *Peninsular and Oriental Company* has, in fact, failed to establish its alleged rights, and the order appealed from must therefore stand. But the Joint Committee has rendered it necessary, or, if not necessary, at least expedient, that the rights of the *Peninsular and Oriental Company* on the one side and those of the Joint Committee on the other should be ascertained and declared. This can be done under Order XXV., rule 5; and, under the peculiar circumstances of this case, and having regard to the contentions raised on both sides, the proper order on the appeal will be to declare that the regulations of the *London and India Docks Joint Committee* contained in the printed pamphlet, and therein numbered 1 to 18, and also the regulations therein contained and headed "Labour in the Docks," not having been made and confirmed as by-laws, are not binding on the Plaintiffs, the *Peninsular and Oriental Steam Navigation Company*, save so far, if at all, as the said company may have agreed or may agree to be bound by the same; and to declare that the said company is not entitled to have berths appropriated to its ships, nor to have other special accommodation or conveniences, except upon such terms as may be agreed upon between the company and the aforesaid Joint Committee. With this declaration the appeal will be dismissed without costs.

BOWEN, L.J.:—

The Defendants in this case are responsible for the issue of a book of regulations, none of which are by-laws made under the authority of their statutes, and none of which have passed the statutory ordeal of an examination by a Judge of the High Court. They do not profess on their face to be statutory by-laws, nor have they ever been presented as such to the Plaintiffs. The regulations, on the other hand, are drawn in a tone of peremptory insistance. Shipowners to whom they are issued are informed that it is to these regulations that ships entering the docks are "required" to conform. The dock company and the

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Defendant committee have indeed a right, as the price of extra facilities which they are not obliged by law to afford to all vessels entering the dock, to insist on compliance with any conditions or regulations which they may choose to impose. But no such clear line of demarcation between what is to be the price of precarious favours, and what is the reasonable demand in respect of legal duties which the docks are bound to discharge, is to be found in these regulations. They have a louder and more imperious sound than is justified by the strict legal rights of the Defendants as against the maritime public at large. To say the least of it, it is arguable that an unwary shipowner, hailing from some primitive quarter of the commercial world, where innocence as to the powers of *London* dock companies prevails, might be deceived by the tone of superior authority into a belief that these regulations were in truth statutory by-laws. And as some of them go certainly beyond what can lawfully be imposed as of right upon an ordinary ship seeking no exceptional favours, but merely access to a public dock—so far as the shipowning public, or any portion of it, could reasonably be misled into thinking that the regulations were statutory by-laws—the Attorney-General, on behalf of the public, might have a right to interfere. No corporate body has a right to impose on that portion of the public which is likely to deal with it, as by-laws judicially sanctioned and confirmed, regulations which have no such legal sanction. Nor can it be denied that it is one of the functions of the High Court to prevent public bodies incorporated by Act of Parliament from exceeding their statutory powers to the injury either of the public or of individuals. No such corporate body has a right to deceive. Whether the regulations in question do or do not pass this clear and simple line, as perhaps they may, is a question which it will be time enough, in my opinion, finally to decide when it is raised; that is to say, when the Attorney-General, on behalf of the public, or a really aggrieved individual, thinks it necessary to raise it. When invoked on behalf of the public by the Attorney-General or by aggrieved persons, the Court on similar principles will always interfere to restrain, not merely untrue language which is calculated to deceive, but all unlawful acts which are calculated to injure.

The present case is not one in which the Attorney-General seeks the interposition of the Court. It is an action by private individuals—incorporated companies who either are shipowners themselves or who represent a collective number of particular shipowners. In order to succeed, the Plaintiffs are bound to shew that the Defendants have either infringed some legal right of the Plaintiffs, or of some one or more of the Plaintiffs, or that the Defendants threaten to infringe some such right. The question is, accordingly, no longer whether the action of the Defendants, in the issue of these regulations, is justified as against the public, but whether the Plaintiffs, or any of them, have been actually aggrieved in a manner that entitles them, or any of them, to relief by way of injunction.

One thing appears to me to be tolerably clear, namely, that whatever shipowners have been simple enough to be imposed on by the dictatorial style of these regulations, the *Peninsular and Oriental Company* have not been the victims of any such innocent delusion. They have known from the first, they have been told from the first—all the negotiations and controversy have proceeded on the footing—that these are not statutory by-laws, and have never been submitted to the review or approval of any judicial authority. As against the *Peninsular and Oriental Company*, the Defendants have never professed the contrary. If the publication of the regulations amounts to a grievance against which in this action the *Peninsular and Oriental* are entitled to complain, the grievance must be classified under some other category or head than that of deception or misrepresentation.

This renders it necessary to pursue, accurately and in such detail as to prevent confusion of thought, the inquiry, what actual wrong has been done to the *Peninsular and Oriental Company*, or what actual wrong is threatened and intended to be done? Even if the *Peninsular and Oriental Company* were shipowners who simply sought access to the docks without asking for exceptional facilities which the dock company are entitled to grant or to refuse at pleasure, I should, myself, feel some difficulty in holding that the *Peninsular and Oriental* were entitled, on such materials as are before us, to ask for an injunction from this Court. An injunction against what? Is it to be an

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injunction against representing to the *Peninsular and Oriental*, as by-laws sanctioned by a Judge, a book of regulations which are not so sanctioned? The *Peninsular and Oriental* have never for a single hour supposed that any such pretence or profession was put forward. Is it an injunction against making such a representation to the public? But the *Peninsular and Oriental* do not represent the public. Are we to be asked for an injunction because the Defendants will persist in asserting that all incoming ships must be taken to admit themselves to be bound by these by-laws by the mere act of coming into the dock? No authority has been produced in favour of the proposition that a Court of Equity can interfere to prevent a corporate body from making, in the course of its own business, immoderate and unwarrantable assertions about its intended legal claim. Can any case be found in which, as distinct from the modern jurisdiction created by railway legislation, any Court of Equity has been successfully appealed to by a trader to prevent either a corporate body or a common-law carrier—whose duties are defined by common law, as a corporate body's are by statute—from saying that he intends to charge his customers too much. Down to the date of *Sutton* v. *South Eastern Railway Company* (1), no such precedent was in existence, and no such precedent has been cited to us since. The usual course, in the case of alleged overcharges or threats of extravagant demand, has always been to leave the complaining party to his common law action; one reason, though not the only reason, being that demands may well have been made which in the last resort never will be enforced, and which it is not seriously intended to enforce in the face of resolute resistance. His proper course, if the worst comes to the worst, is either to refuse compliance, or to submit under protest, and to bring his action for the wrong. I do not indeed doubt that, where the threat by a corporate body, or by any other person, is a threat to do that which will actually violate a legal duty—that which will, in other words, constitute a tort or a breach of contract—this Court will and ought to intervene. But an assertion of an exorbitant business claim, however loudly made, does not constitute a tort unless it is intended to be enforced by some

(1) Law Rep. 1 Ex. 32.

wrongful act. The ordinary shipowner who wanted access to the dock without exceptional facilities would, no doubt, be entitled to an injunction if he could fairly extract from this book of regulations a threat to exclude his ship from the dock unless he submitted to some illegal provision; but I doubt whether any such menace could be found here except by a stretch of vivid imagination. The ordinary shipowner would equally be entitled to complain if he could reasonably discover in these regulations an intention to trespass, in defiance of all prohibition by an owner, on the decks of any of his ships: see Regulation No. 9. Whether the regulation in question—No. 9—amounts to such a violent intimation, may be doubted, nor is it necessary in this action to decide the point. A mere statement, however (to take an obvious instance), that the dock company will not be liable for negligence, or for the custody of the cargo after discharging the ship, may be a proposition wholly worthless and baseless in law—may be a *brutissimum fulmen* as against all who do not choose to agree to it; but the assertion constitutes no legal wrong until it is enforced or threatened to be enforced by some wrongful act, or unless it is calculated reasonably to deceive and does deceive; with which latter hypothesis I have already sufficiently dealt.

In these latter observations I have assumed, for the purpose of the argument, that the *Peninsular and Oriental* is in as favourable a condition in this action as an ordinary shipowner desiring merely access to the dock. But whatever might be the relief to which an ordinary shipowner who sought nothing beyond legitimate access to the docks might be entitled in respect of such a book of regulations, the *Peninsular and Oriental* are not in truth in any such position as he. They neither want, nor do they propose, to accept the ordinary accommodation offered to casual vessels. Their trade cannot be carried on at all unless accommodation is given them at the docks of a wholly exceptional kind, and one which they cannot claim as of right either at common law or by statute. Nothing except agreement and convention can obtain for the *Peninsular and Oriental* the privileges which alone they desire; and such privileges the dock company cannot be compelled to grant except

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on their own terms. The answer to the complaint of the *Peninsular and Oriental* is accordingly this: that as far as they are concerned, the book of regulations (as they are well aware) is not put forward as a book of judicial by-laws, but as the only conditions on which the *Peninsular and Oriental* can obtain appropriated berths. The *Peninsular and Oriental* can take these appropriated berths or leave them, as they please, but they can only have them on the terms of submitting to these regulations. The *Peninsular and Oriental* have no more right, under such circumstances, to relief from this Court than a gentleman who chose to complain that some lady of his acquaintance had declined to marry him except on conditions which were highly unreasonable.

The course adopted by the *Peninsular and Oriental* has been ingenious enough. In order, if possible, to drive to terms a commercial body who were in a vantage position, and who refused to abate some merciless demands, they have sought to utilise for their own benefit in this controversy the fact that the regulations in question have a weak spot in them viewed from the point of view of the law officers of the Crown, or of persons who are in a totally different business position from themselves. But the *Peninsular and Oriental*, for the purposes of this action, do not represent the mercantile world at large or shipowners in general. In this suit they represent simply themselves—that is to say, individual customers who only want appropriated berths, and who are utterly unaffected by, and indifferent to, what may happen to ships which do not need such indulgences. An attempt was made, certainly, in argument to bolster up the case of the *Peninsular and Oriental* by representing that the wrong done to them consisted in depriving them of the true alternative option to which by law they could lay claim; an option, namely, either to accept appropriated berths, or else to insist on simple access to the docks without any exceptional facilities, and therefore without any terms of an extraordinary kind. The short business answer to this business complaint, and the short legal answer to the legal argument is, that the ordinary access to the docks to which all ships are entitled would be of no use at all to the *Peninsular and Oriental*; they do not wish it; they do not

ask for it; they never have asked for it, and have never been refused it; and they cannot by any stretch of legal ingenuity reasonably complain that they have been denied an option which they never intended to use, or have been injured in respect of a theoretical alternative which nobody but a pleader could suppose they ever desired to enjoy.

As for the other Plaintiffs, they have, as it seems to me, no *locus standi* at all. They are not shipowners. They are an association of shipowners incorporated for the protection of the interests of shipowners; but the incorporated body own no ships. They do not want to use the docks at all. It seems to me therefore plain (as Mr. Justice *North* has said), that they are not entitled to come to this Court for any relief. If a number of individuals are injured, all of them may sue. In some cases one or more of them may sue as representing the rest. But the individuals cannot, before they are injured, form themselves into a joint stock company for the purpose of bringing actions on their own behalf, or give to such an incorporated body a legal *locus standi* to sue for them. We were asked, if we felt any difficulty as to the character of the Plaintiffs, to allow some other shipowner to be added whose ship had simply desired access to the docks and nothing more, and who might be deemed to be aggrieved by the imperious tone of these regulations. It is too late to make such an amendment. We should have to begin *de novo*, in the case of any such shipowner, to investigate his exact title to relief, and to decide whether it depended on his having been deceived, or else whether he had been refused admission to the docks, or subjected to some other distinct threat of actual wrong. If any such case can be made, it is too late to make it now in this action. The learned Judge, accordingly, seems to me to have been well advised in dismissing this action. I do not know that I myself should have dismissed it with costs, but this was a matter which was in his discretion, and if we affirm his judgment we cannot interfere with his view about the costs.

It must not be supposed, as far as I am concerned, although I think the *Peninsular and Oriental* are in no way injured by these regulations, that I also consider the publication of these regulations in their present form justifiable or right. It appears to me

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that the dock company and the Joint Committee ought to have more clearly and lucidly defined, on the very face of these regulations, what they are and what they do not profess to be. It ought surely to have been explained on their face that they are not statutory by-laws at all, and that many of them at all events are merely binding on such shipowners as may consent to be bound by them. The shipowning public (if any) which may have observed the peremptory tone of the regulations, would have been somewhat astonished at the comparatively modest level to which the Defendants' advocates before this Court brought down the legal pretensions of the Joint Committee in the argument before us. To prevent mistakes upon the subject, justice will be best done by embodying in the order dismissing this appeal, a declaration which does no more than record the concessions made at the Bar, and the admissions to which the Defendants' counsel were prepared to consent. And the Defendants will, in my opinion, do what is just and right if they reform at once this book of regulations. To mark one's sense of the excess of legal pretension which the book of regulations carries on its face, and which has been to a considerable extent the cause of this litigation, I think that we ought to say that there must be no costs of this appeal, although it fails for the reasons I have given.

KAY, L.J.:—

This action is brought to obtain a declaration that certain regulations, dated the 1st of January, 1891, issued by the Defendants, are invalid unless confirmed as provided by the *Harbours, Docks, and Piers Clauses Act*, 1847, and for an injunction to restrain the Defendants from enforcing or requiring the Plaintiffs to comply with such regulations until so confirmed.

The general statute of 1847 enacts, by sect. 83, that by-laws may from time to time be made for all or any of the purposes mentioned in that section, and by sect. 84 penalties may be imposed for breach of them. But sect. 85 provides that no by-laws made under the authority of that Act or of the special Act shall come into operation until the same shall have been confirmed in the prescribed manner, or, if no manner be prescribed, until they

be allowed by a Judge of the superior Courts, or in *England* by the justices or the quarter sessions; and by sect. 86 notice of the intention to apply for confirmation is to be given in the county newspaper a month before, and any person desiring to object may give notice of the nature of his objection ten days before the hearing of the application, and "may, by himself or his counsel, attorney, or agent, be heard thereon." None of these formalities have been observed with respect to the regulations in question, and it is not and could not be contended that they have the power or effect of by-laws under this statute or the special Act relating to the docks of the Defendants.

Sect. 33 of the general Act runs thus: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

Sect. 23 enables the dock company to lease or grant the use of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences, at such rents and on such terms as may be agreed on for any term not longer than three years.

The special Act of the *London and St. Katharine Docks Company* in 1864 incorporates this general statute, and sect. 113 describes what their by-laws may include. Such by-laws, by sect. 114, are to be subject to the provisions of the general Act of 1847, no other manner of confirming them being prescribed by the special Act. By this and the general Act the payments to be made for use of the docks are a tonnage rate on ships and certain rates on goods specified in a schedule to the special Act. Any other payments must, it would seem, be by agreement under sect. 23 of the general Act to which I have referred.

In 1888 an Act was passed authorizing a working union between the *London and St. Katharine Docks Company* and the *East and West India Dock Company*. By sect. 31 of this Act, all the powers and duties of both companies were vested in the Joint Committee, who are Defendants to this action. Up to the present time the business of these docks has been carried on without by-laws. None have ever been made. The practice has been, until recently, for shipowners to load their ships, but for

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the dock company or the Joint Committee to undertake all the work of discharging vessels that come into the docks; and for the services thus rendered, and also for the use of their quays, and of warehouses built by the dock companies, it is said at great expense, payments were made to the dock company as arranged with the shipowners. In August, 1889, a strike having occurred among the dock labourers, Sir *Thomas Sutherland*, chairman of the *Peninsular and Oriental Company*, in a letter to the *Times*, suggested that shipowners should be left to discharge as well as to load their own ships. This suggestion was practically adopted by the Joint Committee, and the new regulations were adapted to this change in the mode of using the Defendants' docks. The regulations complained of were issued in December, 1890, after an attempt to frame by-laws with the concurrence of the *Peninsular and Oriental Company* had been made and abandoned. Their operation was postponed until the 1st of February, 1891. They were to apply to all ships entering the docks after that date. They begin thus: "Discharge of vessels.—Shipowners will be required to comply with the following regulations, and the regulations of H. M. Customs, of the Fire Insurance Offices, and of the Joint Committee from time to time made." Speaking generally, all the regulations are provisions for the mode of using the docks, quays, and warehouses. Except as by-laws, or except by special agreement with each shipowner, they could not be made compulsory or enforced. The first sentence which I have quoted shews that the Joint Committee give shipowners to understand that if they use the docks they must comply with these regulations. Anyone reading that prefatory sentence who did not know the provisions of the statute, or that these regulations had not been duly confirmed as by-laws, would suppose that they were binding. The meaning of provisions of this kind is that which an ordinary reader would understand to be their meaning. I am clearly of opinion that it is not a proper proceeding on the part of the Joint Committee to publish in this manner, as binding regulations, a set of rules which they know are not binding. Counsel on their behalf have stated that they have never refused to allow persons to use their docks who dissented from these provisions, and have never threatened to do

so, and that, so far as these rules are represented as compulsory, that is a mere *brutum fulmen*, because, in the absence of agreement-express or implied, the rules are not binding on anyone.

But I think that the answer to that argument is, that the Defendants have had large powers granted to them by Parliament on the terms that these docks are always to be open to the use of the public owning ships. They are empowered to regulate the manner of using such docks by framing by-laws as to the provisions of which the shipowners have a right to be heard, and have their objections considered before such by-laws receive judicial sanction. It is not a proper act for a public body like the Defendants to attempt to impose upon the public, as compulsory regulations, rules which they have no power to enforce. If the Attorney-General were suing on behalf of all shipowners who have a right to use the docks, I should have no doubt that it would be the duty of the Court to make a declaration that these regulations have not the force or effect of by-laws, and are not binding on any shipowner who has not agreed to be bound by them. In such a suit the Court in its discretion might restrain the Defendants from attempting to enforce these regulations against any shipowner who had not agreed to them, and also, I think, from representing to the public that they are in any way binding in the absence of agreement. Probably an injunction would not be necessary; the declaration would effect all that was requisite. But I refer to the injunction because it seems to me a case in which relief might be granted in that form, so that no technical difficulty as to making a declaratory decree could possibly arise.

In *Pinchin* v. *London and Blackwall Railway Company* (1) an injunction was sought by the owner of a manufactory to prevent the defendants from taking it under their compulsory powers. They had given him notice that they intended to throw a bridge over a yard belonging to the manufactory. The Plaintiff gave a counter notice to the company requiring them to take the whole manufactory. After a delay of nearly twelve months, the company proceeded to take the whole. The injunction was refused under the circumstances because of the counter notice, although

(1) 5 D. M. & G. 851.

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the original notice to treat was probably invalid. In the course of his judgment, Lord *Cranworth*, justifying the granting of an *ex parte* injunction, said (1) that it then appeared to him, "That the only ground upon which such an injunction as that asked could be granted, was not any personal equity on the part of the plaintiffs, but a ground upon which this Court is very much in the habit of acting, namely, that it will not suffer persons, and more particularly powerful corporate bodies with whom it is very difficult to deal, to take proceedings which are of an illegal or even of a doubtfully legal character under their Acts of Parliament, if by so doing they place those against whom they are proceeding in a condition of peril from which it may be very difficult for them to extricate themselves: to grant an injunction in such cases is a course which has been repeatedly adopted by Lord *Cottenham* and other Judges." One of the cases before Lord *Cottenham* most commonly referred to is the *River Dun Navigation Company* v. *North Midland Railway Company* (2), in which he points out how necessary it is to interfere with a public company which is exceeding its powers to the injury of individuals, and that it is "most essential to the interest of the public" that the extraordinary remedy by injunction "should exist and should be exercised" in such cases. That case has been followed and treated as a leading authority on the subject from the year 1838 to the present time.

The main difficulty in the case before us is one of a rather technical character. The Attorney-General is not a party to this action. His right to sue on behalf of the public to restrain a company from committing illegal acts, without giving any evidence of damage, has often been maintained. The cases on this point are collected in the recent decision of *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Company* (3). An individual or body of individuals, suing for an injunction against a public company for committing some excess or breach of its statutory powers, is required by a most necessary rule to shew that he or they have incurred or may incur special damage by the acts complained of. In *Spencer* v. *London and Birmingham Railway*

(1) 5 D. M. & G. 860. (2) 1 Railw. Cas. 135.
(3) 21 Ch. D. 752.

Company (1), and in *Sampson* v. *Smith* (2), the Vice-Chancellor of *England* held that when an individual suffered special damage from a public nuisance, he might sue for an injunction without making the Attorney-General a party. In the former of these cases a railway company were interfering with a public street without providing an alternative route as required by their statutes, and the plaintiff, being specially damaged, was allowed to sue.

The first-named Plaintiffs in this action are a joint-stock company, limited, formed, according to their memorandum of association, for the protection of the shipping and maritime interests, especially with respect to the regulation, management, customs and usages of the port of *London* and the docks, warehouses, wharves and Custom House therein. But this company does not possess any ships, and does not use the docks in any way, and no unauthorized act of the dock company or of the joint committee can occasion any direct damage to these Plaintiffs. Accordingly, the pleader has joined as co-Plaintiffs the *Peninsular and Oriental Steam Navigation Company*. These are large shipowners, the nature and size of whose steamers make it necessary to their business to use the Defendants' docks. They use them by having certain appropriated berths and warehouses and quay space in those docks, and the point on which the Defendants rely as to them is, that only those parts of the regulations which relate to the occupiers of appropriated berths apply to them. They do not sue in form on behalf of themselves and all other shipowners using these docks, nor would it obviate the technical objection if they did, because they must still shew that the regulations inflicted damage on their own company. They do not sue in respect of any possible use of the docks by themselves without having appropriated berths, warehouses, and quay space, and practically do not use, and probably never will use, these docks without such special privileges.

The particular regulation which applies to shipowners who require appropriated berths, quay or warehouse room, is the second. It provides, in effect, that, for the convenience of shipowners who wish it, the Joint Committee will appropriate a berth,

(1) 8 Sim. 103. (2) 8 Sim. 272.

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including the use of specified quay or shed space, "at the rate of 2*s.* 6*d.* per square yard of quay and shed space per annum, or such other rate as may from time to time be made." Regulation 4 enables the Joint Committee to use or grant the use of any appropriated berth when not actually occupied; and 5 provides that such berths shall only be used for discharge of cargo, not for lying-up purposes.

These are the principal provisions as to appropriated berths. But it is not accurate to say that they are the only ones. 6 provides against competition in wharfage or warehousing with the Joint Committee, and restricts the use of appropriated quay and shed space to receiving, sorting and delivering goods to barges of consignees. 7, 8, 9, 10, 11 and 14 apply as well where berths are appropriated as not, and so also does the provision as to labour in the docks at the end of the regulations. However, undoubtedly the Joint Committee might have a stronger case of implied agreement against shipowners who, with knowledge of these regulations, required and accepted an appropriated berth and warehouse room; and their argument is that the *Peninsular and Oriental* have made such an implied agreement. The regulations, they admit, are not otherwise binding; but they urge that the Court cannot, in this action, declare that there is no implied agreement to observe them. That will be a question for a jury when an action is brought against the *Peninsular and Oriental Company* for breach of their alleged agreement. As to the actual effect of the regulations, it appears from the correspondence that the *Peninsular and Oriental Company* were informed on the 7th of January, 1891, that these regulations were not by-laws. The action is intended to be brought on behalf of all shipowners using the docks. The question is the effect of these regulations, and whether it is a proper exercise by the Joint Committee of their statutory powers to issue such regulations in this authoritative form, and then to say we know they are not binding unless agreed to, but we insist that all shipowners using the docks with knowledge of them should be taken to have agreed to them by implication.

Order XXV., rule 5, in terms empowers the Court to make declaratory judgments "whether any consequential relief is or

could be claimed, or not." But it is suggested that to make such a decree in this case, if the Plaintiffs have no cause of action, would be an excess of jurisdiction; and it has been doubted whether this order gives the Court any new jurisdiction. I refer to the case of *Brooking* v. *Maudslay, Son & Field* (1).

By Order XVI., rule 11, at any stage of a cause the Court may order a party to be added as Plaintiff "who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." If any shipowner or company had been suggested whose name, if added as a co-plaintiff, would have enabled the Court to decide the question and make the required declaration, I should have been disposed to make such addition. But no one is put forward. However, I should be extremely reluctant to refuse to make a declaration in this case upon this ground. The strongest mode of stating the objection is that the present Plaintiffs, even if the Defendants are committing a wrongful act, are not damaged by it, and therefore have no cause of action against the Defendants; and that Order XXV., rule 5, to which I have referred, does not enable the Court to make a declaratory decree in such a case, or if it does, it would be *ultrà vires*. The *Peninsular and Oriental Company*, who are co-Plaintiffs, are shipowners. At present they are using the docks by taking an appropriated berth, protesting all the while that they are not bound by these regulations. They may at any time require to use the docks for ships for which no berth is appropriated. I think that, without adding any other plaintiff, as the suit is now constituted, it is right that the Court should declare to what extent these regulations are proper and can have any effect in law so far as the *Peninsular and Oriental Company* are concerned.

I concur in making the declarations which have been formulated by Lord Justice *Lindley*, that these regulations, not having been made or confirmed as by-laws, are not binding on the *Peninsular and Oriental Company*, save so far, if at all, as the said company may have agreed to be bound by them; and also, on the other hand, that the *Peninsular and Oriental Company* are

(1) 38 Ch. D. 636.

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not entitled to have berths appropriated for their ships, nor to have other special accommodation or conveniences, except upon such terms as may be agreed upon between the *Peninsular Company* and the Joint Committee.

With this declaration the appeal must be dismissed without costs.

Solicitors: *Renshaws; Turner & Hacon.*

G. I. F. C.

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ATTORNEY-GENERAL OF THE DUCHY OF LANCASTER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Practice—Staying Proceedings—Striking out Pleadings—No Defence filed—Pleading raising important question of Law—Rules of Supreme Court, 1883, *Order* XXV., *r.* 4.

Applications under Order XXV., rule 4, to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers, except in frivolous cases, and the Court will not entertain such an application if the pleading raises an important point of law.

An application to strike out a statement of claim or stay proceedings may be made by the Defendant in a proper case before filing his defence.

Per A. L. Smith, L.J.: An application to strike out a pleading can only be made where it can be shewn that the pleading discloses no cause of action or defence on the face of it without extrinsic evidence.

THIS was an appeal from an order of the Vice-Chancellor of the County Palatine of *Lancaster* in an action brought in the County Palatine Court by the Attorney-General of the Duchy of *Lancaster.*

The action was brought for the purpose of asserting Her Majesty's claim to certain lands alleged to be part of the Duchy, which had been taken by the Defendants, the *London and North Western Railway Company.* The Defendants appeared; but before putting in any defence they moved to stay proceedings in the action on the following grounds: First, that the Palatine Court had no jurisdiction to entertain the action in any proceedings in the matter; secondly, that if the Court had juris-

diction the Attorney-General of the Duchy was not a proper Plaintiff to institute the proceedings; and, thirdly, that the proceedings ought to have been in the form of an information, and not of an action.

The motion was made under Order XXIV., rule 4, of the Chancery of Lancaster Rules, 1884, which is the same as Order XXV., rule 4, of the Rules of the Supreme Court (1). The Vice-Chancellor held that he had no jurisdiction to strike out the statement of claim or stay the action under the rule, no defence having been filed, and the action not being on the face of the statement of claim frivolous or vexatious, but raising an important point of law. He accordingly dismissed the motion, and the Defendants appealed from his decision.

Clare, and *Stuart Moore*, for the Appellants:—

The point which we wish to raise is, whether the Attorney-General of the Duchy can bring an action in the County Palatine Court. It was decided in *Attorney-General of the Duchy of Lancaster* v. *Duke of Devonshire* (2) that the Attorney-General of the Duchy could not file an information in the High Court of Justice, and we contend that on the same principle he cannot bring an action *ex officio* in the County Palatine Court. This is an important point of law, which we are desirous of raising without the expense and delay of preparing and filing a defence, which in this case would be considerable; and demurrers being abolished this is the most convenient way of raising the question. The Plaintiff objects that we cannot make the application until we have put in a defence; but the Court has power to strike out pleadings and to stay proceedings at any stage of the action, and that power has been repeatedly exercised before any defence has been filed, as in *Republic of Peru* v. *Peruvian Guano Company* (3). The Vice-Chancellor has not exercised his judicial discretion on the

(1) This rule is as follows:—

"The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

(2) 14 Q. B. D. 195.

(3) 36 Ch. D. 489.

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merits; for he refused to make the order on the ground that he had no jurisdiction.

Sir *H. Davey*, Q.C., and *Maberly*, for the Plaintiff, were not called on.

LINDLEY, L.J.:—

I do not think there is any ground at all for this appeal. It is possible that the Vice-Chancellor may have expressed himself too strongly in saying that there is no jurisdiction. Under Order XXV., rule 4, of the High Court Rules, or Order XXIV., rule 4, of the Palatine Court Orders, I think there might have been jurisdiction. But this does not conclude the case.

Now, what is the motion? The motion before the Vice-Chancellor is that all further proceedings in the action may be stayed. That motion is made by the Defendants, and the only way of dealing with that is to look at the pleadings and see what is the object of the action. The moment we see the nature of this action, and hear the grounds for the application which are set out in the notice of motion, we find there are questions of very great difficulty. The first ground for staying the proceedings, that the Court has no jurisdiction, is not at all an easy matter to decide. Then the other grounds are that the Attorney-General of the Duchy is not the proper Plaintiff, and that the proceeding ought to be an information, and not an action. The Vice-Chancellor says, "I will not stop this action in this summary way even if I have jurisdiction." He knew enough about the matter to understand what it was about; he knew as much as we do, and we understand enough to decline to put in force this method of stopping an action when there are such important questions involved.

Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way." It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the

exercise of the power which is given it under Order xxv., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether.

I do not say anything about the case of *Attorney-General of the Duchy of Lancaster* v. *Duke of Devonshire* (1). Although it was a long case, the Judges entertained it. I do not know whether I should myself have done so or not; but if an application under this rule involves such a discussion as the question in this case would involve, I should say the application ought not to be listened to. The appeal must be dismissed with costs.

LOPES, L.J.:—

I am clearly of opinion that this is not a case for this summary proceeding under Order xxv., rule 4. It is clear, beyond all doubt, that difficult questions are to be raised in this case. Applications under this rule were never intended to take the place of demurrers. The object of the rule was to get rid of frivolous actions. The words of the rule are, "action or defence for which there was no reasonable cause," by which I understand, no reasonable cause disclosed upon the face of the pleadings. The Vice-Chancellor may in what he said have gone somewhat too far when he held that he had no jurisdiction. It is clearly a matter in the judicial discretion of the Judge, and I rather gather from what has been read from his judgment that what he intended to do was to exercise that judicial discretion. This Court is not bound by that. This Court acts as if the matter was *res nova* before it, and it can exercise its discretion as it may think fit. Assume for a moment that the learned Vice-Chancellor did proceed in the way suggested. He acted for himself, and exercised that judicial discretion which in those circumstances

(1) 14 Q. B. D. 195.

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the Vice-Chancellor ought to have exercised. I am clearly of opinion that there is no ground for this application, and the appeal ought to be dismissed with costs.

A. L. SMITH, L.J.:—

If the Vice-Chancellor had founded his judgment upon the fact that he could not act under Order XXV., rules 2, 3, and 4, unless there were pleadings further than the statement of claim, I should have thought he had gone wrong. But if he founded his judgment upon this, that in this case he would not act without further pleadings than the statement of claim, I think he was right.

Now we are asked to say that we should overrule the Vice-Chancellor's decision. Why, when we think that in the result he was right? I only want to make one remark about Order XXV., rule 4. It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies. In this case it is manifest that you must go to extrinsic evidence to shew that the pleading is bad, and directly it comes to that, the rule does not apply.

Solicitors: *F. Whitaker; C. H. Mason.*

M. W.

In re SOVEREIGN LIFE ASSURANCE COMPANY.

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CHITTY, J.
March 30, 31.
C. A.
July 27, 28; *Aug.* 10.

Life Assurance Company—Winding-up—Power of Company to Purchase its own Shares—Policy-holders—Reduction of Security—Extinguishment of Shares.

Directors of a life insurance company were authorized, by special Act of Parliament, to purchase, in the name of the company or otherwise, the company's own shares; pursuant to this power 8781 £10 shares, with £2 10*s.* paid-up, were purchased in the names of trustees for the company, and subsequently transferred into the name of the company. In 1889 the company was ordered to be wound up compulsorily, and the liquidator sought, on behalf of the policy-holders, to make a call upon the shareholders to the extent of the amount unpaid on the purchased shares:—

Held, affirming the decision of *Chitty*, J., that the effect of the purchase by the company of these shares, whether in the names of trustees or of the company, was necessarily to extinguish the shares; that the policy-holders had no charge on the uncalled capital of the company, but were unsecured creditors payable out of the existing assets of the company only; and that the liquidator's application failed, and must be dismissed.

ADJOURNED SUMMONS.

The question for decision in this case was, the effect of the authorized purchase by a company of its own shares.

The *Sovereign Life Assurance Company* was incorporated in 1845, under the *Joint Stock Companies Regulation Act*, 1844 (7 & 8 Vict. c.110). It was governed by a deed of settlement, and had a capital of £500,000, in 50,000 shares of £10 each, of which 18,000 had been issued, and on which £2 10*s.* only was paid up. The deed contained a power to increase the capital (clause 8), but no express power to reduce it. Nor was there any power enabling the shareholders to surrender their shares. There was, however, power to forfeit shares (clause 135), and power to alter the regulations (clause 18). By clause 78 the directors were required to insert in every policy a declaration that the capital stock and funds of the company should alone be liable to answer and make good claims in respect of the policy, and that no director or proprietor should be in any case personally liable or subject to any such claims or demands or be in anywise charged by reason of such policy beyond the amount of his share of such

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capital stock or funds; but in other respects the liability of the shareholders was unlimited. The directors were also required to keep three funds, namely: (1.) The proprietors' guarantee fund, which represented paid up capital; (2.) The life assurance fund, which represented premiums on policies on which no advances were due to the company; (3.) The general fund, which represented premiums on policies on which advances were due to the company and other moneys (clause 152). There were provisions for apportioning the profits accruing on the two last funds between the policy-holders participating in profits and the proprietors (clauses 153 to 158, and 162 to 164). The funds of the company not required to answer immediate claims and demands were to be invested (clause 161), but the investment clause did not authorize the purchase of shares in the company itself. Life policies on which no advances were due were made payable: first, out of the life assurance fund; and secondly, out of the proprietors' guarantee fund, to the exclusion of the general fund (clauses 165 and 166); whilst life policies on which advances were due to the company were made payable first out of the general fund, and secondly, out of the proprietors' guarantee fund, to the exclusion of the life assurance fund (clauses 165 and 166). The deed also authorized an application to Parliament for an Act for better enabling the directors to carry into effect all or any of the objects of the company.

In pursuance of this power the "*Sovereign Life Assurance Company Act*, 1860," was obtained, which enacted (sect. 21) that "It shall be lawful for the directors to lay out and invest, in the name of the company or otherwise, all or any part of the money funds or property of the company in (*inter alia*) the purchase of the shares or policies of the company or any bonuses declared thereon," with power to cause any of the money "so to be laid out and invested as aforesaid to be sold or transferred, or to be changed and varied into any other of the stocks, funds, securities, annuities, shares, policies, or other property hereinbefore mentioned."

Sect. 37 provided "that nothing in this Act contained shall extend, or be construed to extend, to incorporate the company, or to relieve or discharge the company, or any of the members

thereof, from any responsibility, contract, duty, or obligation whatsoever, to which by law they, or any of them, now are, or at any time hereafter may be, subject or liable, as between the company and others; and all contracts, either express or implied, and made or to be made, and all present and future liabilities of any person being, or who shall hereafter be, a member of the company, or any person in trust for the company, or for the use and benefit thereof, shall have such and the same operation and effect and be attended with such and the same legal consequences in every respect as if such person had not been such member."

The company was subsequently registered under the 209th section of the *Companies Act*, 1862.

From 1860 to 1876 the directors exercised the power of purchasing the company's own shares, thus conferred upon them by sect. 21, the total amount of shares so purchased being 8781; the prices ranged from £2 2*s.* 6*d.* to £2 13*s.* per share. These shares were purchased in the open market, and were at first transferred into the names of trustees, for the company; but in 1881 they were all transferred into the name of the company. Dividends out of profits were from time to time declared, but no dividend was in fact ever attributed to the shares so purchased.

In August, 1887, a petition was presented by a policy-holder for the compulsory winding-up of the company, upon which, after some attempts at an arrangement, the usual order was made in July, 1889, and an official liquidator appointed (1).

On the 13th of July, 1891, the official liquidator took out a summons for leave to place the company upon the list of contributories in respect of the 8781 shares purchased as before mentioned, and then to obtain an order for a call of £7 10*s.* per share, or such other sum as might be estimated to produce £65,857 10*s.* (the total amount unpaid on the purchased shares) upon all the contributories of the company. The application was made in the interest of the policy-holders.

This summons was adjourned into Court, and came on for hearing before Mr. Justice *Chitty* on the 30th of March, 1892.

(1) 42 Ch. D. 540.

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Farwell, Q.C., and *Swinfen-Eady*, for the official liquidator:—

The policy-holders were entitled to look to the unpaid capital of the company for the payment of their claims. It was never intended by the special Act of 1860 that the company, by purchasing its own shares, should be able to reduce its capital and to reduce the security of the policy-holders; therefore, these 8781 shares must be considered as still in existence, and the company ought to be placed on the list in respect of them. The effect of placing the company on the list will be, to render the company liable to the proposed call, and thus we shall be able to get a call enforced against the contributories to the extent of the company's liability. The company being only a trustee for its shareholders, such of the shareholders as are left are bound to indemnify the company. Sect. 37 of the special Act points to the fact that the "shares" if purchased were to be kept alive.

Byrne, Q.C., *Stallard*, and *Lemon*, for the contributories:—

These shares when purchased were extinguished. The special Act authorized these purchases, and is binding on the policy-holders as well as the company. It is inconsistent with the essential nature of a company that it should become a member of itself: *Trevor* v. *Whitworth* (1): it cannot be registered as a shareholder, so as to be placed on the list of contributories in its own liquidation.

Farwell, in reply.

CHITTY, J. (after stating the facts, continued):—

The question is, what is the effect of the authorized purchase by the company of its own shares. For the contributories it is argued that the shares when purchased became extinguished; for the liquidator it is contended that they were kept alive, and that the effect of their being kept alive, was, and is, to increase proportionately the liability of the remaining shareholders while the company was a going concern, and of the contributories under the winding-up. It is argued for the liquidator that the effect of placing the company on the list of contributories would be to

(1) 12 App. Cas. 409.

render the company liable to the proposed call: that the company being unable to pay, the other contributories, though they have paid the £7 10s. remaining unpaid at the date of the winding-up, on their own shares, are liable to pay the amount of the company's contribution, on the ground that the company was trustee for its own shareholders for the time being remaining on the register, and that such shareholders are bound to indemnify the company as their trustee.

This reasoning for the liquidator is fanciful and unsound. It may be tested in this way. While the company was a going concern, could the company have made a call on itself? The thing is absurd: the answer is, that it could not. Nor could the company have made an effectual call on its own trustees while the shares stood in their names: the company itself would have been bound to indemnify its own trustees against the call, and accordingly, immediately to refund the amount paid by the trustees, or, rather, itself to pay the call, which would be the proper way of indemnifying the trustees. Again, while the company was a going concern, what would have become of the dividends on the purchased shares? On the hypothesis that the shares were not extinguished, they would have gone to the company itself. The profits made by the company were divisible in certain proportions between the shareholders and the policy-holders, or such of them as were entitled to participate in profits; the company could not have set up a sort of individual right against the policy-holders so as to diminish their proportions attributable to the policies.

But it is useless to pursue these refinements any further. I think that the effect of the purchase, whether in the name of trustees or of the company, was necessarily to extinguish the shares. The purchase in the names of trustees was an extinguishment in equity, and the transfer of the shares to the company which was justified by the Act, was an extinguishment in law and in equity. The power to purchase, being contained in an Act of Parliament, bound the policy-holders as well as the company and the shareholders. The proviso in the 37th section of the Act of 1860 has no bearing on the question. It merely provides that nothing in the Act contained shall extend to

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incorporate the company, or to relieve the company or any member thereof from any responsibility to which by law they or any of them were or might thereafter be subject to as between the company and others. It imposes no new liability on the members by reason of the exercise by the directors of the powers conferred on them by the 21st section. It is inserted in the Act with reference to the special provisions contained in the *Joint Stock Act* of 1844, as to the quasi incorporation of the company, and the liability of members, neither of which was to be affected by the Act of 1860.

As to authority, I am content to rest my judgment on the principle stated by Lord *Watson* in *Trevor* v. *Whitworth* (1). He said that it appeared to him that, as the late Master of the Rolls had pointed out in *In re Dronfield Silkstone Coal Company* (2), it was inconsistent with the essential nature of a company that it should become a member of itself. That it could not be registered as a shareholder, with the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation.

There is nothing in the point argued for the liquidator on the effect of the power to vary investments at the end of the 21st section of the Act of 1860. The word "shares" there means undoubtedly the shares of the company which alone are mentioned in the previous parts of the section. The argument is founded on the word "shares" at the end of the section; but it is really based on the impossible hypothesis of all the company's shares having been previously purchased. This hypothesis is impossible, because having regard to the directors' qualification, which renders it necessary that they should hold shares, all the shares could not have been purchased. The term shares in this part of the section means shares not already purchased, and remaining available for purchase by the directors. It is wholly insufficient to shew that the Legislature meant that the purchased shares should be kept alive. For these reasons, I think the application of the liquidator fails, and must be dismissed.

(1) 12 App. Cas. 424. (2) 17 Ch. D. 76.

W. C. D.

From this judgment the official liquidator appealed. The appeal came on to be heard on the 27th of July, 1892.

Moulton, Q.C., *Farwell*, Q.C., and *Swinfen Eady*, for the Appellant, cited *Chapman and Barker's Case* (1); *Cree* v. *Somervail* (2).

Byrne, Q.C., and *Lemon*, for the contributories, referred to *Trevor* v. *Whitworth* (3); *In re Dronfield Silkstone Coal Company* (4).

Farwell, in reply.

1892. Aug. 10. LINDLEY, L.J.:—

The object of this appeal is to obtain an order for a call upon shareholders who have paid up their own shares in full since the company was ordered to be wound up, but who are said to be liable to make good a large portion of the capital of the company which ought to be forthcoming for the payment of policies granted by the company. The company was formed in 1845, and was completely registered under the *Joint Stock Companies Regulation Act*, 1844 (7 & 8 Vict. c. 110). Being completely registered, it became an incorporated company; but the liability of its shareholders was unlimited. It was governed by a deed of settlement. Its capital was £500,000, divided into 50,000 shares of £10 each, and £2 10*s*. per share was called up long ago, but no more had been called up by the directors before the company was ordered to be wound up. [His Lordship then referred to the provisions contained in the deed of settlement as stated above, and continued]:—

In 1861 a supplemental deed was executed, altering the deed of 1845 in some respects, but there is nothing in the supplemental deed which requires notice on the present occasion. Such being the constitution of the company, it issued policies in the form usually adopted by insurance companies formed under the Act of 1844, limiting the liability of the shareholders to the funds of the company.

In 1860 the company obtained a private Act of Parliament

(1) Law Rep. 3 Eq. 361.
(2) 4 App. Cas. 648.
(3) 12 App. Cas. 409.
(4) 17 Ch. D. 76.

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enabling it, amongst other things, to invest its own moneys in the purchase of its own shares.

The company did accordingly, at various times between 1860 and 1876, buy up 8781 of its own shares. At first they were transferred to and were registered in the names of trustees for the company, but in 1881 they were transferred into the name of the company itself, and that is their position at the present time. Only £2 10*s.* has been paid up upon these shares. In July, 1889, the company was ordered to be wound up. Calls have been made on the shareholders beyond the amount of the shares held by them. But the policy-holders being still unpaid they have taken out a summons in the name of the liquidator to have a call of £7 10*s.* made upon the company in respect of the above-mentioned 8781 shares, and to compel the members of the company who are on the list of the contributories to pay that call, amounting in the whole to £65,857 10*s.* Mr. Justice *Chitty* dismissed the summons. Hence this appeal. The appeal raises the following legal questions, viz.:—1. What would have been the rights of the policy-holders against the funds of the company and against its members, if the Act of 1860 had not been passed? 2. How are those rights affected by that Act? In order to answer the first of these questions it is necessary to read the policies and to ascertain how they have been construed by the Courts. The policies run thus: They provide that, if the premiums shall be duly paid, "then the funds and other property of the company shall be subject and liable, according to the provisions of the deed or deeds of settlement of the company, to pay to the executors, administrators, or assigns of the assured" the amount of the policy. The policies contain also this clause, "Provided also that the capital stock of the company, or as much thereof as for the time being shall have been subscribed, and other the stocks, funds, securities, and property of the company remaining at the time of any claim or demand made, unapplied, and undisposed of, and not absorbed by or required to answer or meet any prior claim or demand, or claims or demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, shall alone be liable to answer and make good all claims and

demands upon the company in respect of this policy, and all other policies granted by the company, and that no director or other proprietor of the company, his or her heirs, executors, or administrators, shall, by reason of any policy of assurance or instrument securing annuities, or of the whole of the policies of assurance or instruments securing annuities taken together, which any director has signed or may sign, or upon any other account, be in anywise individually liable or subject to any claim or demand, or claims or demands, against the company beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such parts of the said capital stock as for the time being shall have been subscribed."

The true construction and legal effect of policies in this form are no longer open to doubt. They were settled thirty or forty years ago after much litigation, both at law and in equity. The settled law upon the subject, so far as it bears on the present case, may be thus expressed, viz.: 1. The policy-holders acquire no charge at law or in equity upon the funds of the company; 2. Their right (when their policies become payable or provable against the company) is to be paid out of the then existing funds of the company, including its then uncalled-up capital; 3. They have no right to call upon any shareholder to pay more than the full amount of the shares held by him and unpaid up when the demand is made upon him. These propositions will be found to be the net result of the following well-known decisions, viz., at law: *Halket* v. *Merchant Traders Ship Loan and Insurance Association* (1); *Hallett* v. *Dowdall* (2); and *King* v. *Accumulative Assurance Company* (3); and in equity *Lord Talbot's Case* (4); *Law* v. *London Indisputable Life Policy Company* (5); *Ex parte Durham* (6); and *Bell's Case* (7). For the purposes of this decision the first proposition is the most important. The non-existence of any charge on the funds of the company was finally determined by *In re State Fire Insurance Company* (8), and since *Bell's Case*, has never, I believe, been questioned. In *Bell's*

(1) 13 Q. B. 960.
(2) 18 Q. B. 2.
(3) 3 C. B. (N.S.) 151.
(4) 5 De G. & Sm. 386.
(5) 1 K. & J. 223.
(6) 4 K. & J. 517.
(7) Law Rep. 9 Eq. 706.
(8) 1 H. & M. 457; 1 D. J. & S. 634.

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Case Vice-Chancellor *James* said (1): "It has been settled in these cases that there is no equitable charge upon the assets. It is a mere debt. . . . . The words of the policy no doubt furnish a very plausible argument, but the rational conclusion is, that they do not make the assured the mortgagee of any particular part, so as to entitle him to take the assets. It merely indicates a mode by which he is to be paid."

Bearing this in mind, I pass on to the second question, viz., the effect of the special act. The important section is the 21st, but the 37th has also to be considered. The 21st section is as follows. [His Lordship read the section as set forth above, and proceeded:—] It is impossible to read this section without coming to the conclusion that the company was authorized to buy its own shares. But what does this necessarily involve? It involves the purchase of part of the capital for the benefit of the holders of the rest of the capital—*i.e.*, it involves a reduction of capital; and this again alters the relative proportion of profits to be divided, and of the number of shares amongst which they are to be apportioned. It is impossible to read the section in such a way as to increase the liability of those members who were to be benefited by the investment or purchase; and yet this would be the result if the Appellant's construction is right. According to them the shares bought by the company ought to be treated as subsisting, and as held by a trustee for the company. But if this were so the trustee would be liable, in the event of a winding-up, to a call of £7 10*s.* per share, and the members of the company would be liable to indemnify him, and their liability in this respect would be unlimited. So that the result would be that, instead of benefiting them, a most serious burden would be imposed upon them. Such a construction of sect. 21 is quite inadmissible. A reduction of capital is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of its own shares.

But then reliance is placed on sect. 37. [His Lordship read the section, and continued:—] The object of this section is plain enough; it was to preserve the unlimited liability of the shareholders. The section confers no new rights. It saves

(1) Law Rep. 9 Eq. 720.

rights which, but for the Act, would exist; and the section is so worded as to apply not only to the holders of policies issued before the Act passed, but also to the holders of policies issued afterwards. What effect then has it on the holders of policies issued by the company? If they had had, independently of the Act, an equitable charge on the uncalled-up capital of the company, that charge would, I think, have become preserved, and the Appellant would have been right, and machinery would have had to be found for giving effect to his rights. But there was no such charge, and this is the short and conclusive answer to the Appellant's case. The policy-holders remain what they always were, viz., unsecured creditors of the company, with the funds of the company applicable to their payment. But these funds do not include capital extinguished by statutory authority.

This appeal must be dismissed with costs.

LOPES, and A. L. SMITH, L.JJ., concurred.

Solicitors: *James Robinson; Hepburn, Son, & Cutcliffe.*

M. W.

EAST MOLESEY LOCAL BOARD *v.* LAMBETH WATER-WORKS COMPANY.

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[1892 E. 867.]

Water Company—Local Authority—Breaking up Streets—Laying Water-pipes—Notice—Plan—"Difference to be determined by two Justices"—Special Act—"Extension" of Works—Laying down Pipes after expiration of Period for completion of Works—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 30, 31 [*Revised Ed. Statutes, vol. x., p.* 66]—*Practice—Interim Injunction—Undertaking in Damages—Corporation.*

The "plan" required by sect. 31 of the *Waterworks Clauses Act*, 1847, to be furnished by a water company to the road authority before breaking up a road for the purpose of laying down a line of pipes, is a plan, not merely of the "breaking up" of the road, but also shewing the mode in which the underground work is intended to be executed, so as to enable the road authority to judge whether the proposed work ought to be done without modification. If the road authority, after receiving such a plan, do not, in case of disapproval, themselves make some counter-proposal, by plan or otherwise, as to the mode of carrying out the work,

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so as to create a "difference" to be determined by two Justices under the section, the company may proceed with the work independently of the road authority.

Edgware Highway Board v. *Colne Valley Water Company* (1) approved cf.

Order of *Kekewich*, J., varied.

Semble, where under a special Waterworks Act, incorporating the *Waterworks Clauses Act*, 1847, a water company has, within the period fixed by the special Act for the completion of the works, laid down a water-main in a road within the limits of the Act according to deposited plans and sections, the company may, after the expiration of the period, lay down a second main, having regard to sect. 28 of the general Act, and particularly where the special Act gives them power to "extend, enlarge, or alter any of their mains or pipes at any time, and from time to time as occasion may require, for the purpose of supplying the inhabitants within the limits of the Act with water"; provided the company complies with the requirements of the special and general Act, as to notice and otherwise, before breaking up the road for the purpose.

Per Kekewich, J. Where an interim injunction is granted at the instance of a plaintiff corporation, the Court will, in a proper case, allow the usual undertaking in damages to be given by the corporation itself, and not require the undertaking to be given by some responsible individual on behalf of the corporation; and the same practice may apply where the plaintiff is a local board.

By the *Lambeth Waterworks Act*, 1848 (11 Vict. c. 7), after reciting (amongst other things) certain previous *Lambeth Waterworks Acts*, and that it would be of public advantage if the company incorporated under those Acts "were enabled to construct additional works," the recited Acts were, by sect. 1, repealed, and the company was, by sect. 2, re-incorporated under the title of "*The Company of Proprietors of Lambeth Waterworks.*"

By sect. 3 all the existing works, lands, powers and privileges of the old company were vested in the new.

By sect. 9 the *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Waterworks Clauses Act*, 1847, "except where the same shall be inconsistent with or repugnant to any of the provisions of this Act," were incorporated with the special Act.

Sect. 11 specified the limits of the Act.

By sect. 30 the company were authorized to make and maintain certain additional works according to plans, sections, and a book of reference deposited with the Clerk of the Peace, and to enter

(1) 46 L. J. (Ch.) 889.

upon, take and use such of the lands mentioned in the plans and book of reference as they should deem necessary for the purposes of that and the incorporated Acts.

By sect. 31 the company were authorized, within the limits described on the plans, to draw and impound water from the river *Thames* for the purpose of supplying water within the limits of the Act. Sect. 34 fixed a period of seven years for the completion of the works.

Sect. 46 enacted that nothing in the Act should interfere with or affect rights vested in persons having the superintendence, control, or management of any sewers, or of any street, road, or highway: provided that nothing in that or any Act of Parliament contained should prevent the company from breaking up any street, &c., within the limits of the Act for the purpose of repairing any mains or pipes in case of accident, they giving notice to the local surveyor, &c., as soon as practicable after any such street, &c., should be broken up; and provided also, that nothing "in any Act or Acts of Parliament shall prevent or be construed to prevent the said company from breaking or taking up any street, road, highway, bridge, or public place within the powers and limits of this and the said incorporated Acts, for the purpose of laying down or altering any mains or pipes, the said company giving three days' previous notice to such surveyor or clerk in manner aforesaid."

By an extension Act, the *Lambeth Waterworks Act*, 1871 (34 & 35 Vict. c. 83), after reciting (amongst other things) that it was expedient that the company should be empowered to make further works, and that the limits within which they were authorized to supply water should be extended, the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, and the *Waterworks Clauses Act*, 1847, were, by sect. 2, incorporated with that Act.

By sect. 4 the company were authorized to make and maintain the conduits, lines of pipes, and other works shewn on the deposited plans, and to enter on, take, and use such of the lands described in the deposited plans and book of reference as they required for the purpose.

By sect. 11 it was enacted that, if the works authorized by the Act were not completed within seven years from the passing

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of the Act, then, on the expiration of that period, the powers thereby granted for executing the same, or otherwise in relation thereto, should cease to be exercised, except as to so much thereof as was then completed; "but nothing in this Act shall restrict the company from extending, enlarging, or altering any of their apparatus, mains, or pipes at any time and from time to time, as occasion may require, for the purpose of supplying the inhabitants within the limits of the company's Acts with water."

By sect. 16 it was enacted that the limits of the Act of 1848 should include, in addition to those specified in sect. 11 of that Act, certain additional parishes, namely, *West Molesey* and *East Molesey*, in the county of *Surrey*, and that the company accordingly in and in relation to those parishes might exercise and should be subject to the same powers and obligations as, by virtue of the Act of 1848, and any other Act relating to the company, and the present Act, they might have exercised or would have been subject to, in, or in relation to those parishes had they been originally comprised in the limits of the Act of 1848.

Under the provisions of their Act of 1871, and within the period therein specified, the company laid down a water main along *Walton Road*, a somewhat narrow road in the parish of *East Molesey*, the main being one of the works expressly authorized by the Act.

In 1890 the Plaintiffs, the *East Molesey* Local Board, submitted to the Local Government Board a scheme, and in 1891 an amended scheme, for sewering their district, one of the roads proposed to be sewered being *Walton Road*. Inquiries were accordingly held by an inspector to the Local Government Board, the Defendants being represented at the inquiries by their counsel and engineers; and eventually, on the 22nd of September, 1891, the amended scheme received the approval of the Local Government Board.

In February, 1892, the Plaintiffs became aware of the intention of the Defendants, the water company, to lay down a second main along *Walton Road*, which would—as the Plaintiffs considered—leave an insufficient space for the proposed sewer. The clerk to the Plaintiffs thereupon wrote to the Defendants requesting to be

furnished with a plan shewing the position of the proposed main; and on the 10th of July, 1892, the Defendants sent the Plaintiffs a plan of the road, shewing by a line the position of a proposed 36-inch main, at the same time giving a written notice, dated the 9th of July, stating that it was their intention, by virtue of the powers conferred upon them by sect. 16 of their special Act of 1871, sects. 9 and 46 of their special Act of 1848, and sects. 28 to 34 of the *Waterworks Clauses Act*, 1847, and all other statutory powers, on and after the 14th of July, 1892, to open and break up *Walton Road*, shewn on the accompanying plan and section, for the purpose of laying down a line of pipes therein in accordance with such plan and section. The Plaintiffs did not express either approval or disapproval of the plan and section—in fact they did nothing—and the Defendants followed up their notice by commencing, on the 20th of July, to open and break up in *Walton Road*; whereupon, on the same day, the Plaintiffs issued the writ in this action, and served the Defendants with notice of motion for an interim injunction to restrain them from acting on the notice.

In an affidavit filed by the Plaintiffs' engineer in support of the motion, he stated that if the Defendants laid their main in the position proposed it would greatly increase the difficulty and cost of laying the Plaintiffs' main sewer and of making the necessary connections with the houses; but he stated that these difficulties might be minimised if the Defendants agreed to lay their proposed main in a position which he had suggested to them—namely, in another part of the road and at a lower level—but which they had declined. In reply to that affidavit the Defendants' engineer filed an affidavit stating that the position of the proposed main would not necessarily cause difficulty in laying the proposed sewer; and also that, if the Defendants were to lay their main as suggested by the Plaintiffs' engineer, the mere laying would certainly involve a large additional expenditure by reason of the increased depth, and would, by interfering with the hydraulic gradient of the main, materially interfere with its efficiency.

The motion for injunction came on for hearing before Mr. Justice *Kekewich* on the 3rd of August, 1892.

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Warmington, Q.C., and *Eyre*, for the Plaintiffs:—

The local board object to the laying down of this new main in any position which would place their sewerage scheme, which has been sanctioned by the Local Government Board, under any difficulty. The question is whether the Defendants have power under their special Acts of 1848 and 1871 and the general Act, the *Waterworks Clauses Act*, 1847, which is incorporated therewith, to lay down this main. We submit they have not.

First, we say that the notice, which, it seems, was intended to be given under sects. 28 to 34 of the general Act (1), is bad

(1) Sects. 28 to 34 of the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), are grouped under the following heading:—

"And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows:

"28. The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

By sect. 30 the undertakers are required before breaking up any street, &c., to give three clear days' notice of their intention to the persons having the control or management thereof, or their officer, except in cases of emergency.

Sect. 31 is as follows:—

"No such street, bridge, sewer, drain, or tunnel shall, except in the cases of emergency aforesaid, be opened or broken up except under the superintendence of the persons having the control or management thereof, or of their officer, and according to such plan as shall be approved of by such persons or their officer, or in case of any difference respecting such plan, then according to such plan as shall be determined by two justices; and such justices may, on the application of the persons having the control or management of any such sewer or drain, or their officer, require the undertakers to make such temporary or other works as they may think necessary for guarding against any interruption of the drainage during the execution of any works which interfere with any such sewer or drain: Provided always, that if the persons having such control or management as aforesaid, and their officer, fail to attend at the time fixed for the opening of any such street, bridge, sewer, drain, or tunnel, after having had such notice of the intention of

altogether. Any such notice could only have been given as regards either the original works authorized by the special Act of 1871, or an extension of those works. Now the seven years limited for the construction of the original works have long since expired, and the main which is proposed to be laid down does not form part of the original works authorized by sect. 4 of the Act of 1871; neither can it be regarded as an extension of existing works within the meaning of the Act. It is an entirely new work, for the making of which fresh parliamentary powers are required.

Secondly, we say that even assuming the Defendants have a right to give the notice, they have not complied with sect. 31 of the *Waterworks Clauses Act*, 1847, which requires a plan to be "approved of" by the local authority before breaking up a street; here it has not been "approved of," and therefore a "difference" has arisen which can only be determined by two justices as provided by that section: *Edgware Highway Board* v. *Colne Valley Water Company* (1), where *Hall*, V.C., held that a refusal by the local authority to approve the plan submitted to them constituted such a difference. The plan is clearly insufficient, for it does not give any particulars as to the construction of the new main. It was incumbent on the Defendants to communicate all particulars of the proposed work to the Plaintiffs, so as to enable them to judge whether it ought to be done in the manner proposed. It is important for the Plaintiffs to preserve their powers to carry out the scheme sanctioned by the Local Government Board.

Renshaw, Q.C., and *Yate Lee*, for the Defendants:—

The contemplated works are an extension of the existing works, and are "necessary for supplying water to the inhabitants of the district," within the meaning of the special Acts and sect. 28 of

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the undertakers as aforesaid, or shall not propose any plan for breaking up or opening the same, or shall refuse or neglect to superintend the operation, the undertakers may perform the work specified in such notice without the superintendence of such persons, or their officers."

Sects. 32 to 34 relate to the reinstatement of any street, &c., so broken up.

(1) 46 L. J. (Ch.) 889.

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the *Waterworks Clauses Act*, 1847: *East London Waterworks Company* v. *Vestry of St. Matthew, Bethnal Green* (1).

The power given by sect. 46 of the special Act of 1848 to break up streets for the purpose of laying down pipes is unlimited in point of time, and there is nothing in any of the Acts restricting the company to one line of pipes, if they find additional pipes are necessary for supplying their district.

As regards notice, we submit we have strictly followed the statutory requirements. We gave our notice under sect. 30 of the general Act, and submitted our plan under sect. 31; the Plaintiffs never proposed any counter-plan, and they neglected to superintend the breaking up of the road; and accordingly we were entitled to proceed with the work. In fact, the consent of the local authority to laying down a second line of pipes in the road was not necessary at all: *Dover Gas Light Company* v. *Mayor of Dover* (2). In *Edgware Highway Board* v. *Colne Valley Water Company* (3), the plan was altogether insufficient; whereas the present case has proceeded on the footing of the plan and section being sufficient. To grant this injunction will cause great inconvenience, and also serious injury to the Defendants. At all events, if an injunction is granted, some responsible person should give an undertaking in damages on behalf of the Plaintiffs. In *Edgware Highway Board* v. *Colne Valley Water Company*, the chairman gave a personal undertaking on behalf of the local board.

KEKEWICH, J.:—

The objection that there is not in existence a plan according to which the Defendants may properly construct the works is, in my judgment, fatal. With regard to the other point, which is of course by far the more important point in the case, I will not now say more than that my present opinion is decidedly against the Plaintiffs' contention. It seems to me that the general and special Acts, when read together, give the Defendants ample power to do that which they propose to do, subject to their observing what the Acts of Parliament say they shall observe,

(1) 17 Q. B. D. 475. (2) 7 D. M. & G. 545; 1 Jur. (N.S.) 812.
(3) 46 L. J. (Ch.) 889.

and to their complying with the provisions of those Acts. The 28th section of the general Act of 1847 covers, in terms, what is proposed to be done, and that Act is incorporated in the special Acts. I have been unable to find any section which, by any reasonable construction, can be said to prevent the Defendants from doing that which the general Act authorizes them to do. They have, no doubt, to give certain notices, submit certain plans, and otherwise comply with the provisions of the Act of Parliament; provided they do that, they seem to have sufficiently large powers. I do not construe the 46th section of the Act of 1848 as an enacting clause in the sense of giving the company powers which they otherwise would not have. I construe the Act strictly as an Act providing certain restrictions on their operations. In the first place, the section saves the rights of certain authorities which, without examining them in detail, include the present Plaintiffs. It seems to me that the general powers of the water company might be severely and largely curtailed if that saving clause stood alone; and therefore Parliament thought fit to add to the saving clause certain provisoes, one proviso being directed to the case of accident, another to more permanent requirements; and I think that the provision of a three days' notice assists that construction. For the reasons I have already mentioned, I think it would be wrong to go further into the matter, or to do more than indicate my general opinion formed after having heard the Plaintiffs' argument in opening the case, and that of the Defendants, but without having heard such a reply to the Defendants' argument as Mr. *Warmington* might have been able to present. I leave that part of the case with the distinct expression of that as being my present opinion.

On the other part of the case, I feel myself bound by the decision of Vice-Chancellor *Hall* in *Edgware Highway Board* v. *Colne Valley Water Company* (1). Mr. *Yate Lee* has urged on me the inconvenience of deciding either this point, or the one which I have now dismissed, on an interlocutory application. I am perfectly aware of the inconvenience of deciding any question on an interlocutory application; but there are some questions which must be so decided, and the obligation is none the less because

(1) 46 L. J. (Ch.) 889.

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the judgment on interlocutory applications may really be a final judgment in the cause. The proceedings in the Chancery Division sometimes make that a convenient course, sometimes make it necessary. This, to my mind, is a case of the latter character, and what I say on this point must be no doubt (subject to further argument) a final judgment on the case.

The 31st section of the general Act provides that, besides the notice, about which I have now nothing more to say, the street is to be opened or broken up "according to such plan as shall be approved of by such persons or their officer"—that is, in the present case, the Plaintiffs—"or in case of any difference respecting such plan, then according to such plan as shall be determined by two justices." It also provides for there being an officer present to superintend the operation; but the possible failure on the part of the officer to attend is met by a further provision that, if he refuses or neglects to superintend the operation, then the undertakers may proceed without his assistance—that is to say, the water company shall not operate without the superintendence of a person on behalf of the local authority unless he refuses to superintend. As regards the plan, the provision is not so explicit; it is simply that the work is to be done according to a plan "approved," or, in case of difference, determined, by two justices. Obviously, in ordinary parlance, there is something omitted. The person to whom a plan is submitted may approve, or he may disapprove or differ from it; he may decline to do one or the other; he may have nothing to object to, he may have no alternative plan to propose, and yet he may be unwilling to approve of it; that may, according to the language of the Act, be the meaning of "in case of any difference." I am very far from saying that that is an easy question. I am not sure, if I were at liberty to do so, that I should decide it in the same way as Vice-Chancellor *Hall* did, though I am very far from saying I should not; but what I do say is, that the Vice-Chancellor has decided it, and I am bound by his decision. I have read his language more than once, and I have invited the criticism of counsel upon it. In that case I think one may say there was no sufficient plan; that was evidently the Vice-Chancellor's opinion, although he took the alternative view.

Here the plan is a sufficient plan, admitted by the Plaintiffs to be a sufficient plan, and treated by them as such; but it has not been "approved" by them. The Defendants do not say it has, and it was not approved by the plaintiffs in the case before Vice-Chancellor *Hall*. The Vice-Chancellor says this (1): "The defendants' case is that it is not incumbent upon them to get their plan approved or else go to the justices." He puts it as though there was no possible third course; that there must be either a plan approved or a plan determined by the justices. Then he says: "If it was not a plan at all, then the defendants are wrong for not submitting a plan." That is not the case here. "If it was a plan, the defendants should have applied to two justices." One might have expected him to say, "because there was a difference"; but he does not. Then he says: "I do not think that in this case anything was done by the plaintiffs amounting to an approval within the meaning of the Act." It is impossible, to my mind, to read that otherwise than as indicating expressly the Vice-Chancellor's opinion that absence of approval was equivalent to a difference. If it were so, then at once you have the necessity of having the plan determined by two justices. On that ground I think the injunction must be granted as asked by the notice of motion. Of course, the injunction will be till the trial or further order, and of course, also, there will be an undertaking in damages according to what is now the settled practice of the Court. The inconvenience, no doubt, will be considerable. That I cannot help. I am obliged to hold that the Defendants have not done that which they ought to do in order to enable them to exercise the powers conferred upon them by the Act of Parliament.

As regards the undertaking in damages, Mr. *Yate Lee* suggests that, as the damages may be considerable, the Court ought to insist upon something more than the ordinary undertaking—that an undertaking should be given by the Chairman of the Local Board, or some other person competent, in the Defendants' view, to meet the possibly large demands on the finances of the Plaintiffs. I am not aware of any rule or practice that enables me to do anything of the kind. I am by no means sure

(2) 46 L. J. (Ch.) 890.

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that if, in a proper case, the attention of the Court is called to the fact that the plaintiff is obtaining an injunction which may produce great damage, and that he is in the position of a person who is incompetent, the matter may not be open to consideration; but I am not aware of any case in which that has been considered. The practice used to be that joint stock companies or corporations could not give their undertaking in damages merely by counsel; somebody was required to sign the Registrar's book. That practice has, to my own knowledge, been broken into very much of late years. I myself persuaded Mr. Justice *Kay* to accept the undertaking of a joint stock company as plaintiffs in damages without anything more, on the ground that the company could be made as much responsible by the undertaking of counsel as an individual; and I see no reason to doubt the soundness of that rule. I am also aware that the practice is by no means uniform on that point. Why a local board should not give an undertaking in damages by counsel, I do not know. I express no judicial opinion upon the point; but I take it that, if a local board gave an undertaking which is enforceable, and which is enforced against them, they would be able to levy those damages as part of their rates. I suppose that must be so. They would be entitled to be indemnified against money which they had paid. That may require, of course, investigation, and their powers may be limited; but I should act on that rule unless I were satisfied in any particular case that the plaintiffs were not competent to give a proper undertaking. Another exception might perhaps be where the plaintiffs were not the real plaintiffs, but only nominal plaintiffs, and representing some body who could give a better undertaking. There are, I have no doubt, possible exceptions; but in this case I have heard nothing to induce me to depart from the usual rule; and I say that, the Plaintiffs giving their undertaking in damages by counsel in the usual form, they are entitled to have their injunction without more. I make the costs, costs in the action.

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The Defendants appealed. The appeal was heard on the 6th and 8th of August, 1892.

Rigby, Q.C., *Renshaw*, Q.C., and *Yate Lee*, for the Appellants:—

We say that our notice is a good notice, and that the plan we submitted is sufficient. The *fasciculus* of clauses in the *Waterworks Clauses Act*, 1847, ss. 28–34, relate exclusively, as the heading shews, to "the breaking up of streets for the purpose of laying pipes": accordingly, the "plan" required by sect. 31 is a plan of the opening or breaking up of the street, that is, a plan shewing where the opening and breaking up is to be, and not of the underground work at all, and such was the plan furnished by us. The Act does not require us to furnish drawings or "sections" of the main for the approval of the road authority. Then the latter part of the section says that, if the road authority fails to attend to superintend the breaking up as shewn by the plan, and does not propose any counter-plan, the undertakers may do the work. In other words, if nothing is done by the road authority the superintendence clause is at an end: the road authority has no control over the plan, but merely has the right to attend the breaking up. The Plaintiffs say: "You have one main already: you have no jurisdiction to lay another and so interfere with our proposed sewer"; but although we sent them our plan and stated our intention of doing what, in their view, was illegal, they never expressed any disapproval, and they allowed us without any interference or opposition from them to open the road, for we received no communication whatever from them from the 9th of July, when we gave notice, until the issue of the writ. It is, therefore, not a case for an interim injunction at all. The road authority has no power to interfere with the water company doing under sect. 28 what is necessary to supply their district with water.

[LOPES, L.J., referred to Vice-Chancellor *Hall's* decision in *Edgware Highway Board* v. *Colne Valley Water Company* (1).]

That case is not like the present, and this Court is not bound by it. Our present point, namely, that a plan of the underground works is not required by sect. 31 of the general Act, was not dealt with either by Vice-Chancellor *Hall* in that case or by Mr. Justice *Kekewich* in the present case. We contend that to read the

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section as requiring a plan of the works, and not merely of the breaking up of the street, is inaccurate and not in accordance with the view of the Legislature in framing this group of clauses. We admit that the section is not a very lucid one; but sect. 28 shews that the undertakers are to be the judges of what is necessary for the supply of water, and sect. 31 deals only with superintendence over the breaking up, not interference with the works. This is shewn more clearly by sect. 32, which says that the undertakers "shall with all convenient speed complete the work for which the same (the road) shall be broken up," that is, without any superintendence or interference. Again, sect. 33 shews that the plan to be approved under sect. 31 is a plan of the "manner" in which the street is to be broken up, and the section imposes a penalty if the undertakers do wrong. In most cases the local authority would not propose a plan at all, but rely on the remedies given by the Act. Then sect. 31 only operates where it is not contradicted by the special Act, and we submit that anything in the general Act controlling our operations is repealed by sect. 46 of the Act of 1848, which says expressly that "nothing in any Act or Acts of Parliament shall prevent" us from breaking up any road for the purpose of laying down pipes. We submit, therefore, that if there be anything which appears to interfere with our rights, whether under the general Act or elsewhere, it is swept away by this sect. 46.

Then, coming to the special Act of 1871, sect. 11 gives the company full power to "extend" their mains "as occasion may require" for the purpose of supplying the district with water. Sect. 16 makes the Act of 1848 apply to the district now in question, that of *East Molesey*.

[LOPES, L.J.:—We come back really to sect. 31 of the general Act.]

Yes; with the addition of sect. 46 of the special Act of 1848. We say that the proviso in sect. 31 of the general Act cuts down the previous part of the section, and that if the road authority do not approve of the plan sent them they must themselves propose one, and we say that if no such plan is proposed, then there is no "difference" within the section, and therefore no necessity

for going to the justices at all. In *East London Waterworks Company* v. *Vestry of St. Matthew, Bethnal Green* (1), the Court of Appeal took a very wide view of the meaning of sect. 28 of the general Act, holding that the power given by that section included any works whatever which the undertakers might think necessary for the supply of water. In *Dover Gas Light Company* v. *Mayor of Dover* (2) it was held that parliamentary powers should be construed widely. Accordingly it was there decided that the company, having power originally to lay down one main, were entitled to lay down as many supplementary mains as they thought necessary. In conclusion, we submit that, upon the construction of sect. 31 of the general Act, if the road authority disapproves of the plan proposed by the water company they must propose a counter-plan or take some objection, otherwise there is no "difference" upon which to go to the justices; and that, if the company sends in a plan and the road authority does nothing, then the proviso at the end of the section takes effect.

[LOPES, L.J.:—Ought you not to have written to the road authority to ask whether they approved of your plan?]

We submit not. The Act does not say we are to make any further inquiry. All that is incumbent upon us is to let them know what we are going to do.

Sir *H. Davey*, Q.C., *Warmington*, Q.C., and *Eyre*, for the Plaintiffs:—

We do not object to the Appellants laying down their main in the road, provided they do so in such a position and manner as not to interfere with the sewer which we are bound to supply for the district.

[LINDLEY, L.J.:—I think it is plain from the affidavits of the two engineers that, whatever the case was when the writ was issued, there is, now at all events, such a "difference" as can be referred to two justices.]

We have no objection to the case being referred to some independent engineer as umpire, who could settle the question better than the justices.

(1) 17 Q. B. D. 475. (2) 7 D. M. & G. 545; 1 Jur. (N.S.) 812.

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Rigby:—We assent to that.

[An order was accordingly taken, by consent, discharging the injunction and referring it to the engineers of the Plaintiffs and the Defendants to determine on what plan the proposed works were to be carried out: in default of agreement between those engineers, the question to be referred to a third (named) engineer as umpire: the Defendants undertaking not to proceed until the decision of the referees or the umpire was given. All proceedings in the action to be stayed. Each party to pay their own costs of the action and the appeal, and one-half of the costs of the umpire.]

LINDLEY, L.J.:—

I think it desirable, as the matter has been so much discussed, for us to say that we think the construction put upon sect. 31 of the general Act by Vice-Chancellor *Hall* is right. I will say a few words about that as we have thought over it.

Sect. 28 enacts that "the undertakers, under such superintendence as is hereinafter specified"—that refers to sect. 31—"may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works," and so on. Sect. 30 I may pass over except by mentioning that it provides that notice must be served before breaking up the street. Then sect. 31, which is the important one, runs thus—it is not very aptly worded—"No such street, bridge, sewer, drain, or tunnel shall, except in the cases of emergency aforesaid, be opened or broken up, except under the superintendence of the persons having the control or management thereof, or of their officer, and according to such plan as shall be approved of by such persons or their officer, or in case of any difference respecting such plan, then according to such plan as shall be determined by two justices." Now, pausing there for a moment, the question arises—What sort of a plan is meant? The language is that no street shall be opened or broken up except "according to such plan." The "plan," therefore, must refer to the opening or breaking up

of the street; it is not a plan of the works which the waterworks company contemplate, but it is a plan shewing what they are going to do in and with the street which they are about to break up. It is no use having a plan shewing only where the road is to be picked up; its object is to shew the local authority where the pipes are going to be put—whereabouts in the road, both as regards depth and as regards lateral position—that is what the local authority want to know: such a plan is the plan which is referred to in this section.

Then the section goes on: "And such justices may, on the application of the persons having the control or management of any such sewer or drain, or their officer, require the undertakers to make such temporary or other works as they may think necessary for guarding against any interruption of the drainage during the execution of any works which interfere with any such sewer or drain."

Then there is this proviso: "Provided always, that if the persons having such control or management as aforesaid, and their officer, fail to attend at the time fixed for the opening of any such street, bridge, sewer, drain, or tunnel, after having had such notice of the intention of the undertakers as aforesaid, or shall not propose any plan for breaking up or opening the same," then the undertakers may perform the work without those persons. The plan there mentioned is the same sort of plan as is referred to before, viz., a plan shewing the interference with the street. The meaning of the section is that if the local authority do not like the plan submitted to them, and will not propose anything themselves, so as to make a difference to be referred to the justices—in other words, if the local authority bring the whole matter to a deadlock by declining to do anything—then the undertakers may go on. That is the true construction of the section, and that is the construction which was put upon it by Vice-Chancellor *Hall* in the case to which we have been referred; and I am satisfied that it is the true construction. In this case we now see by the affidavits that the parties might have gone to the justices: that is quite obvious. There is such a "difference" that we should not think of stopping the water company's works entirely; and the injunction, if we had to grant

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one, would have to be modified so as to leave the parties in this position, that if they could not agree they would have to go before the justices. However, the matter will not take that course now, as the parties have agreed to refer the matter to their engineers or, in case of difference, to a gentleman named as umpire.

LOPES, L.J.:—

Before we were referred to the case of *Edgware Highway Board* v. *Colne Valley Water Company* (1), I had read the 31st section of the general Act in the same way that the Vice-Chancellor read it. I entirely agree with the decision in that case. I have only one word to say with regard to the plan which is mentioned in sect. 31. The object of that plan, to my mind, is this—to give information to the road authority as to the nature and character of the work proposed, not merely as to the breaking up and opening of the surface of the road, but as shewing and giving information as to what is proposed to be done underground. Having said that, I agree entirely with what has been said by Lord Justice *Lindley*.

Solicitors: *Cann & Son; Bell, Stewards, & May.*

(1) 46 L. J. (Ch.) 889.

G. I. F. C.

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[28 of 1891.]

Company—Winding-up—Public Examination—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Companies (Winding-up) Rules,* 1890, *r.* 71.

The Court has no jurisdiction to direct a person to be publicly examined under sect. 8, sub-sect. 3, of the *Companies (Winding-up) Act,* 1890, unless the Official Receiver has made a report stating that, in his opinion, a fraud has been committed in the promotion or formation of the company, or by a director or other officer of the company since its formation; and that the person whom it is proposed to examine has taken part in the promotion or formation of the company, or has been a director or officer of the company.

The expression "such report" in sect. 8, sub-sect. 3, means a further report under sub-sect. 2, not a preliminary report under sub-sect. 1:—

Semble, that an application to have a person publicly examined under the above sub-section may be made *ex parte.*

Decision of *Vaughan Williams,* J., reversed.

AN order having been made on a creditor's petition, presented on the 13th of March, 1891, for winding up the *Great Kruger Gold Mining Company,* the Official Receiver, on the 15th of August, 1891, made a preliminary report, pursuant to the *Companies (Winding-up) Act,* 1890, s. 8, sub-s. 1, wherein he set out in a schedule a statement of affairs submitted by the secretary and two directors, which shewed that the unsecured debts of the company were £1183 0*s.* 2*d.,* and the assets £2 3*s.* 2*d.,* leaving a deficiency of £1180 17*s.*; and that there was no unpaid capital liable to be called up; and that there had been issued 130,000 vendors' shares of £1 each, which were issued as fully paid-up, and 4782 ordinary shares of £1 each, which had been paid up. He went on to state that, in his opinion, further inquiry was desirable as to the matters relating to the promotion, formation, and failure of the company, and the conduct of the business thereof, on the following grounds. He went on to state to the effect that the company, which was promoted

* See *In re Trust and Investment Corporation of South Africa, post,* p. 332.

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by the *Development and Investment Company, Limited,* now in liquidation, was registered on the 7th of December, 1887, with a nominal capital of £150,000 in £1 shares, of which 134,782 had been allotted, and that there were 917 shareholders. That the original intention of the company was to acquire certain claims on a gold-proclaimed farm in the *Transvaal*; but that the negotiations for them went off, and the application-moneys of the intending shareholders were returned. That afterwards, about July, 1889, fifty claims were purchased by the company for £130,000, which was satisfied by the issue of 130,000 fully paid-up shares. That a very large number of those shares had been sold, many of them within a short period after the allotment. That the directors, on the 17th of July, 1889, proceeded to allotment on an application for 200 shares. That the total working capital, which had been subscribed by eight persons and had only been received gradually, had been £4775, which was quite inadequate to carry on mining operations, and to this cause was attributed the insolvency of the company. After setting out an account explaining the deficiency, he stated that the licenses which constituted the company's title to the properties in the *Transvaal* had been allowed to lapse; that the machinery owned by the company was said to be unmarketable; and that there were five creditors.

On the 30th of March, 1892, the Official Receiver made a further report, in which, after referring to the abortive negotiations for claims, he went on to say that no further action was taken till June, 1889, when, under what would appear to have been the guidance of Mr. *L. W. Cloete,* the company, acting through the seven original signatories, entered into an agreement for the purchase of fifty claims, which, so far as the Official Receiver could learn, were no part of the claims originally intended to be purchased, and that the consideration was agreed at £130,000, which was satisfied by the issue of 130,000 fully paid-up shares to the vendor and his nominees. That the directors then proceeded to allotment upon an application for 200 shares, and the company had received subscriptions amounting in the aggregate to £4775, the greater part of which was contributed by persons closely connected with the persons most interested in

the company. That upon the allotment of the vendor's shares, the vendor and his nominees (chiefly, it was believed, by help of the constant appearance of favourable notices in a *London* financial newspaper) proceeded to dispose of such shares, in which there was considerable dealing, the number of contributories in respect of such fully paid-up vendors' shares being at the present time about 900. That, in the opinion of the Official Receiver, the promotion, formation, and conduct of the business of the company, and especially with regard to the issue of the vendor's shares, required further investigation.

On the 11th of April, 1892, Mr. Justice *North*, in Chambers, on the application of the Official Receiver, made *ex parte*, on the ground of the above reports and without any evidence, an order that the several persons whose names and addresses were set forth in a schedule thereto should attend before . . . "and be publicly examined as to the promotion and formation of the company, and as to the conduct of the business of the company, and as to their conduct and dealings as directors or officers of the company or otherwise."

The schedule contained seven names: *L. W. Cloete*, "promoter and director"; *J. Thorley*, "vendor and director"; *J. R. Campbell*, "vendor of first company"; *J. S. Kennedy*, "director"; *F. S. Barnard*, "subscriber for shares on the formation of the company"; *H. Dale*, "manager of the company"; *William Gower*, "secretary of the company formerly."

None of these persons, except *Cloete*, were named in either of the reports.

On the 24th of June, 1892, *F. S. Barnard* gave notice of motion to discharge this order, so far as related to him, "on the grounds that neither in the said order, nor in either of the reports made by the Official Receiver in pursuance of sect. 8 of the *Companies (Winding-up) Act*, 1890, is there any statement or suggestion that the said *F. S. Barnard* was a promoter, director, or officer of the said company, or took any part in the promotion or formation of the company; or that, in his opinion, any fraud had been committed by the said *F. S. Barnard* in the promotion or formation of the company; and that, on the contrary, the books of the company, when produced by the Official

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Receiver, will shew that the said *F. S. Barnard* did not apply for or take any shares in the company on the formation thereof, and that he is not a person whom the Court has jurisdiction to summon for public examination under the provisions of the said section."

The motion came on for hearing before Mr. Justice *Vaughan Williams* on the 29th of June, 1892.

Farwell, Q.C., and *Grosvenor Woods*, in support of the motion:—

The order was obtained on an *ex parte* application by the Official Receiver, supposed to be based on some report made by him under sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890.

Two reports have been made by the Official Receiver, but neither of them is sufficient to support an application for a public examination. One is the preliminary report, under sub-sect. 1 of sect. 8, which the Official Receiver is bound to make as to the capital, estimated assets and liabilities, and causes of failure of the company, and "whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof." In no case can an order for public examination be made on the preliminary report. The Official Receiver, to obtain such an order, must make the further report or reports, under sub-sect. 2 of sect. 8, stating how the company was formed, and "whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." If an order for public examination of any particular person is required, the further report or reports must contain a direct charge of fraud against him as a promoter, or director, or other officer of the company; and then, and then only, can the Court, under sub-sect. 3, "after consideration of any such report" —*i.e.*, the further report mentioned in sub-sect. 2—"direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company," shall attend for public examination. But the Applicant is not

charged with fraud; he has never been a promoter, director, or officer of the company; and his name is not even mentioned in any report. The only allegation about him, even in the schedule to the order, is that he is a "subscriber for shares on the formation of the company," and there is nothing to shew that he is in any way within the section. Yet, on an *ex parte* application, he has been ordered to submit himself for examination in public about some supposed misconduct of the nature of which he has no previous notice. This involves examination by the Official Receiver (sub-sect. 4); examination by the liquidator, if there is one, and any creditor or contributory (sub-sect. 5); examination by the Court (sub-sect. 6). His answers are on oath. He may have a copy, before examination, of the official report, at his own expense, which expense would be thrown away if the report did not state some definite charge against him, and, "if exculpated from any charges made or suggested against him," the Court may allow him costs (sub-sect. 7). This part of the clause shews that the report must state what charge the person to be examined will have to meet. The notes of his examination may be used in evidence against him, and are open to the inspection of creditors and contributories (sub-sect. 7).

It is obvious that such an examination might be used for a sinister purpose. The Act creates a new—we will not say a Star Chamber—jurisdiction, which is not to be exercised on shadowy grounds, or on a mere *ex parte* application. It goes further than sect. 115 of the *Companies Act*, 1862, for it authorizes an examination in public where the person examined is *primâ facie* presumed to be guilty, and has to exculpate himself if he can.

[VAUGHAN WILLIAMS, J.:—You must not assume the applicant has any *locus standi* to complain of the order: *In re Gold Company* (1).]

That case has been frequently dissented from, and is no longer law. No case even of general fraud has been reported. The report shews the failure was really due to other causes.

(1) 12 Ch. D. 77.

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[They also referred to *In re North Australian Territory Company* (1), and to the Companies (Winding-up) Rules, 1890, rr. 69, 71, 74.]

Muir Mackenzie, for the Official Receiver:—

The order is right and was obtained regularly. Sect. 8 was enacted for the purpose of obtaining information.

[VAUGHAN WILLIAMS, J.:—If there was no report, could the Court order a public examination? There is a good deal to be said for the suggestion that it can only be done under sub-sect. 3, and that sub-sect. 3 refers to the persons mentioned in sub-sect. 2.]

It may well refer to the portion of the preliminary report mentioned in par. (*c*) of sub-sect. 1, although no report has been made under sub-sect. 2. Sub-sect. 7 only means that the person to be examined is to have a copy of the report if he asks for it.

[VAUGHAN WILLIAMS, J.:—That seems to be so.]

The written report may be supplemented by the Official Receiver giving "further information" to the Judge when he is considering the report, and the Official Receiver is to attend such consideration: Companies (Winding-up) Rules, 1890, r. 71.

Farwell, in reply.

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The question raised on this motion is one which, so far as the particular Applicant, Mr. *Barnard*, is concerned, does not seem to me of any great practical importance. But, although the question may not be one of any great practical importance so far as he is concerned—because it is plain to me that, whether or not the proper steps were taken in order to obtain this order, the proper steps could now be taken and a similar order obtained—yet the question is of great general importance, because I have really to determine what is the effect, generally, of sect. 8 of the *Companies (Winding-up) Act*, 1890, and what are the steps which it is incumbent upon the Official Receiver to take under

(1) 45 Ch. D. 87.

that section, and who, if anybody, has the right to object if he fails to take the proper steps.

I think the most convenient course will be for me to deal, first, with the last question—that is to say, whether Mr. *Barnard* has any right to come here and make the objection which he has made. Now, I think, having regard to the nature of the objection he has made, that he had no right to come here and make it at all. The power which is given to the Court under sect. 8 of the Act of 1890 is in some respects like the power which is conferred by the 115th section of the *Companies Act*, 1862, and like the power that has from time to time been conferred by successive Bankruptcy Acts, for examination by the Court of persons who, it is supposed, may be able to give information to the Court which would be useful in the administration that has to be conducted. But of course there is a great difference between the two sections, because sect. 115 is a section which has for its object the information of the Court as to matters as to which the Court at present has or may have no information whatever, that is to say, the object of the section is such that it would seem a proper exercise of discretion by the Court to make an order for the issue of the subpœna merely upon a suspicion or probability that information might be obtained, and without any *primâ facie* case being made out against the person summoned to give evidence, whereas, under the 8th section of the Act of 1890, I, as at present advised, think that it would not be a wise exercise of the discretion of the Court to make an order for an examination upon grounds which might be very sufficient under the 115th section, that is to say, upon a mere suspicion or a mere probability that useful information might be obtained. I have thought it right, in dealing with this question of *locus standi*, to point out this distinction between the sections in order to shew that the distinction between the sections and the objects of them has not escaped the observation of the Court. But I can point out this similarity between the two sections. Neither section gives any right to anybody to obtain an order for this examination. The real fact of the matter is, that the making of the order is wholly and entirely the act of the Court. The examination, when it takes place, is the examination of the Court.

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Nobody has a right to call upon the Court to exercise its discretion; and, when the Court has exercised that discretion, in my opinion, nobody has a right to come here and call in question the propriety of the exercise of that discretion. It is for the Court to decide whether or not it thinks that, under the circumstances, there should be an examination; and if the Court thinks there ought to be an examination, the Court will conduct that examination; and the Court cannot admit the *locus standi* of any one to come here and say that that was a wrongful exercise of discretion.

I wish, however, to have it understood that of course this decision does not mean that no one has a right to come and say that there was no jurisdiction to exercise that discretion, or no jurisdiction in the Court to order the examination. It is plain that it is the right of every one, the absolute right of every one—and a right so absolute that nothing, not even the Legislature, could take it away—to come and say there is no jurisdiction to do the act which the Court has purported to do here. Therefore, if Mr. *Barnard* had come here and satisfied me that there was no jurisdiction to make the order, he would have had a *locus standi* to come and satisfy me of that. Again, I do not mean by this decision to say that Mr. *Barnard* has not a right to come here and say that to make this order would be an abuse of the power which the Court has, or that to make this order would be oppressive. No one would have a right to come here and say that the Court, in the exercise of its judgment, had abused its powers, or had done what was oppressive; but what every one has a right to do is to come here and say to the Court: "You have been set in motion here, you have been induced to act here, without a full knowledge of the facts, or without having your attention called to the oppression that would result from your act." I say that under these circumstances, again, every one has a right to come and place such information before the Court. The right is as absolute almost as the right to come and say that there is no jurisdiction. This matter has been under consideration with reference to the 115th section of the Act of 1862. It is said that Sir *Edward Fry* and the Court of Appeal, in *In re Gold Company* (1), went too far in denying the *locus standi* of persons,

(1) 12 Ch. D. 77.

who felt that the exercise of the power of the Court would be an abuse of the process of the Court or oppressive, to come to the Court and ask to have the order set aside. I doubt very much whether, if the judgment of Sir *Edward Fry* or Sir *George Jessel* is carefully read, it will be found that it goes at all too far. I know the proposition that it has sometimes been said is deducible from their observations does go too far; but I doubt whether that proposition can fairly be deduced from the observations in their judgments. At all events, the more recent cases, *Heiron's Case* (1) and *In re Imperial Continental Water Corporation* (2), both shew that the Court does recognise the right of those who would be oppressed by the order to come and say that the order is oppressive. In both those cases the person who complained of the order said that it was oppressive because there was a pending action between some person who was interested in having the examination ordered and the witness ordered to be examined, and that to allow the examination to take place would be to extend the litigant's right of discovery beyond his proper right as a litigant. Therefore, I wish it to be distinctly understood that I am in no way denying the right of any one to come here and say this order should not have been made because there was no jurisdiction, or that this order should not have been made because it will operate oppressively, or because it has been obtained really by some one who moved the Court to act with an object foreign to the scope of the section, although by way really of abuse of the process of the Court. But I do say that no one has a right to come here and say that, upon the balance of the facts stated in this report, the Court should not have exercised its jurisdiction.

What is Mr. *Barnard* really here for? I am quite aware that in the course of the argument it was put to me that there was no jurisdiction to make this order, because the proper steps had not been taken. It was said that the proper conditions precedent had not been complied with, and that, therefore, the Court could not act under sub-sect. 3 of sect. 8. It is said that a proper report under sub-sect. 2 of sect. 8 is a condition precedent to the exercise of the power under sub-sect. 3. I am not going

(1) 15 Ch. D. 139. (2) 33 Ch. D. 314.

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to decide that question, and I do not think I should be doing anything useful in expressing an opinion on it one way or the other. But what I do decide is, that if it be true that a report under sub-sect. 2 is essential to the exercise of the jurisdiction under sub-sect. 3, that report has been made in the present case, and therefore the steps necessary to the jurisdiction have been taken, even if it be true that the making of the report under sub-sect. 2 is necessary. Sub-sect. 2 says: "The Official Receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." In my opinion, it is not necessary that he should state all the matters which are there catalogued. It is sufficient in any case if he states any one of them; and I think that the report as it stands does state matters which themselves are so relevant to the matter in hand as to give the Court jurisdiction, if it thinks fit, after considering those facts so stated, to make an order for the examination of any person it thinks it is desirable to examine. It is said that there is no jurisdiction to make the order unless the report informs the person to be examined of what the charge to be brought against him on the examination is, or whether there is any charge to be brought against him personally. In fact, it is said that the report required by sub-sect. 2 must be in the nature of an indictment; that that indictment must shew personal default on the part of the person to be examined; and that, unless it does so, the indictment contained in the report is demurrable, and the order ought not to be made. I do not agree with that in the slightest degree. Although, as I have already pointed out, this section is not a section which has been enacted for, what I will call for short, "fishing purposes," like the 115th section of the Act of 1862, yet, in my judgment, it is by no means necessary that the report should contain anything in the nature of an indictment, or a definition of any charges against

the person to be examined. I therefore say that, in my judgment, Mr. *Barnard* has not made out his contention, if it was his contention, that the Court had no jurisdiction to make the order. No case of oppression, no case that the examination here is asked for for a purpose foreign to the object of the section, has been attempted to be made. Therefore, in my opinion, Mr. *Barnard* has failed with regard to both of the matters in respect of which alone he would have had a right to question this order or to quarrel with the discretion of the Court in having made it.

But I do not mean to leave the case here. Although Mr. *Barnard* has no *locus standi* here to quarrel with the discretion of the Court, the circumstances under which this order has been made have necessarily come before the Court in this discussion, and I consider that I have the right and the absolute duty to correct anything which I think has been wrongly done whenever I get the information which shews me that it has been wrongly done, wherever that information comes from. Now, I have carefully read through these reports, and I can only say that I do not believe that if the attention of Mr. Justice *North* or his Chief Clerk, whichever it was that made the order, had been called in detail to this report, any order would have been made for the examination of Mr. *Barnard* on the report as it stands. But, as I have already said, I do not believe that the object of this section was a mere fishing examination, and, speaking for myself, I lay down this rule for the exercise of my discretion—that if in the report there is nothing to suggest that the particular person sought to be examined has had anything to do with the promotion, formation, or failure of the company, or the conduct of its business, it is not right that the order for the examination should be made. It is said: "Oh, but when you go before the Judge for an order, the 71st rule of 1890 provides that the Official Receiver, or his counsel or solicitor, shall attend the consideration of the report, and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require; and *non constat* but what such information and explanation were given and were of a character which would justify the exercise of this

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discretion." There, again, I say that, as far as I personally am concerned, I will not allow that to be done. If the information and explanation are to form the basis of the exercise of the discretion, it is obvious that such information and explanation ought not to be left in the vague limits within which they necessarily are left if they depend upon mere oral statements. Such further information ought to be put into writing; and, in the short time I have had to deal with this Act, if further information has been brought before me by the Official Receiver, I have ordered such information to be put into the shape of a further report, and I propose to do so for the future.

Thinking, then, that the discretion in the particular case here was wrongly exercised, what I am going to do is this. I am not going to discharge the order, but I am going to take care that the proper matters—which I have been informed by the learned counsel representing the Official Receiver can be stated, justifying an order for the examination of Mr. *Barnard*—shall be put by the Official Receiver into the shape of a supplemental report. I require that that supplemental report shall shew me some ground for supposing that Mr. *Barnard* has been so concerned in the promotion, formation, or failure of the company, or the conduct of its business, that it is desirable that he should be subjected to a public examination. And the way in which I propose to have that done is this: I shall direct the learned Registrar, when he takes the examination, not to proceed with the examination, but to adjourn it until the further report has been presented. There is no reason why the further report should be made at such time as to give Mr. *Barnard* the opportunity of considering it; but, as I have already said, the report is merely to assist me in the exercise of my discretion, and Mr. *Barnard* has no right to see it otherwise than under the provisions of the 7th sub-sect. of sect. 8 of this Act of Parliament. Therefore, there need be no delay. I direct that, before any questions are put in examination, the Official Receiver do put in such a report, and that that report be submitted to me personally to see whether I think the examination then ought to proceed. The examination, as I have already said, is the examination of the Court. The Court is responsible for the examination, and if

at any time the Court is satisfied that, under the circumstances, the examination ought not to proceed, the Court ought to stay the examination; and at the present time I am satisfied that this examination ought not to proceed unless some further information is first given to the Court by the Official Receiver. I can hardly conceive that the Official Receiver, having regard to the statement which has been made to me on his behalf, will want time; but, if he does want time to make his report, the learned Registrar will give him the necessary adjournment—an adjournment it may be of hours only, or an adjournment of days.

The order for the examination which has been made stands; but, as a mere step in the conduct of that examination, I have given a direction to the Registrar which does not take the shape of any order drawn up on this motion. The obligation of Mr. *Barnard* now will be to forthwith attend at the examination at the time appointed; and when he does attend he will be informed whether or not the proper additional report to comply with my directions has been filed. If it has been, he knows from what I have said that the Registrar will go on. If it has not been filed, he knows from what I have said that the Registrar will not go on.

On the Applicant's counsel stating that it was intended to appeal at once from the refusal to discharge the order, his Lordship dismissed the application with costs, but stayed the execution of the order for a week, on the Applicant undertaking to present himself for examination when required.

F. E.

Barnard appealed from this decision. The appeal came on for hearing on the 7th of July, 1892.

Farwell, Q.C., and *Grosvenor Woods*, for the Appellant:—

It is a condition precedent to the jurisdiction of the Court to make an order for the examination of a person under sect. 8, subsect. 3, of the Act of 1890, that he should have been reported by the Official Receiver to be a person who in his opinion has taken part in the promotion or formation of the company, or has been a director or officer of it. There is no statement in either

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of the reports that the Appellant had acted in any of these capacities. The Court cannot make such an order on mere verbal statements by the Official Receiver or any one else. Again, such an order for examination ought not to be made *ex parte*. The person against whom it is made is placed in the position of a person suspected of fraud in the promotion or management of the company, and he ought to have an opportunity of shewing cause against it. His position is very different from that of a person summoned as a witness under the *Companies Act*, 1862, s. 115, who is only summoned as a person able to give information as to the assets or dealings of the company: *Heiron's Case* (1); *In re North Australian Territory Company* (2).

Ingle Joyce, and *Muir Mackenzie*, for the Official Receiver:—

We submit that the order could be made *ex parte*. The 4th section of the Act of 1890 appoints a new permanent official. Sect. 7 provides for the submitting to him a statement as to the affairs of the company. Sect. 8 directs him to make a report as to the assets and liabilities, as to the causes of the company's failure, and whether further inquiry is desirable. Sub-sect. 2 authorizes him to make a further report stating how the company was formed, and whether in his opinion any fraud was committed by any person in its promotion or formation, or by any director or other officer of the company since its formation; and by sub-sect. 3 the Court may, after consideration of any such report, direct the public examination of any person who has taken part in the promotion or formation of the company, or has been a director or officer of the Company. This is a new departure in procedure, and we submit it was intended that on consideration of the reports the Court should have power to summon before it any person answering the description in sub-sect. 3. The Act does not say any person reported to be guilty of anything.

[LOPES, L.J.:—The Act only provides for calling some one who has taken part in the promotion or formation of the company, or been a director or officer. The language of sub-sect. 7,

(1) 15 Ch. D. 139. (2) 45 Ch. D. 87.

moreover, appears to import that he must be accused of something.]

The Official Receiver is a trusted officer of the Court; he is to be present in Chambers when the report is considered; and if he gave the Judge verbal information that the person whom it was proposed to examine filled a particular position, the Court might act upon that information.

[LINDLEY, L.J.:—Anybody may be examined under sect. 115 of the *Companies Act*, 1862; and if, on such private examination, something is found out that brings him within sect. 8, sub-sect. 3, of the Act of 1890, his public examination under the latter Act could be ordered.]

The Court would hardly be likely to direct a second examination.

[LINDLEY, L.J.:—I see no reason why it should not.]

If the order is not made *ex parte*, and a contest is to be entered into whether a person is liable to be examined, the object of giving the power of examination will be defeated.

Farwell, in reply:—

Serious damage is done to Mr. *Barnard* by the advertisement that he is to be examined. It has an effect like a report that a man has been charged at a police court.

[A. L. SMITH, L.J.:—If the company went to allotment on *Barnard's* application for shares, would not that be evidence that he had something to do with the formation of the company?]

I submit that it would not. The proceeding to allotment is the act of the directors, and *Barnard* was not a director. It cannot be said in any reasonable sense of the words that a person has taken part in the formation of a company because he has applied for shares in it.

[LINDLEY, L.J.:—It would be very inconvenient if there could be a contest whether a person is liable to be examined. An appeal might be carried to the House of Lords on the question.]

The section was intended only to apply to plain cases. If there is a doubt, recourse should be had to sect. 115 of the Act

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of 1862. The Official Receiver wants to examine *Barnard* under the Act of 1890 to find out whether he was a promoter; but he has no right to examine him unless he was a promoter. The sound view is that sub-sects. 2 and 3 are connected, and that an examination can only take place if a further report has been made under sub-sect. 2; and at the very least, before a person can be examined under this clause, the report must find that he has taken part in the promotion of the company. I put it as a matter of right that every one is entitled to be heard on the question whether he fills the position which makes him liable to be examined.

LINDLEY, L.J.:—

The question raised by this appeal is one of the most important that has come before the Court for a long time, and it arises from the machinery applicable to the winding up of companies having been materially altered by the Act of 1890.

The question is, upon what materials a Judge who makes an order for the examination of a person under sect. 8 of the *Companies (Winding-up) Act* of 1890 is to be satisfied that the person to be examined is liable to examination under that section.

The facts before us are these. *The Great Kruger Gold Mining Company* has been ordered to be wound up, and under the Act of 1890, sect. 8, sub-sect. 1, a report has been made by the Official Receiver stating, in substance, that further investigation into its affairs is desirable. Nobody who looks at the statement of affairs can doubt for a moment that that opinion of the Official Receiver is perfectly well founded. The case is unquestionably one which ought to be probed to the bottom. Then the Official Receiver applied by summons to the Court upon that report, and another report to which I will allude presently, that certain gentlemen, whose names and addresses are set forth in the schedule to the summons, might be directed to attend to be publicly examined as to the promotion and formation of the company, and as to the conduct of the business of the company, and as to their conduct and dealings as directors or officers of the company or otherwise. In the schedule to the summons—for I will call it a summons,

though it was not served on anybody—there is the name of "*Frank S. Barnard*," whose address is put down as "*The Hut, Surbiton, Surrey*, or the *Stock Exchange, E.C.*," and his connection with the company is put down as "Subscriber for shares on the formation of the company." Upon that application, Mr. Justice *North*, having before him the two reports of the Official Receiver, to which I will refer presently, made an order that Mr. *Barnard* should attend and be publicly examined under the Act of 1890. Mr. *Barnard* says: "I am not a person who has taken any part in the promotion or formation of the company, nor am I a person who has been a director or officer of the company, and that being so, the Court or the Judge had no jurisdiction whatever to order me to be examined in the way in which I have been ordered to be examined." He accordingly applied to Mr. Justice *Vaughan Williams* to discharge Mr. Justice *North's* order. Mr. Justice *Vaughan Williams*, sitting as an additional Judge in the Chancery Division, and taking the place, under an order of the Lord Chancellor, of Mr. Justice *North* for this purpose, declined to discharge the order, and Mr. *Barnard* appeals to us.

This raises the important question to which I have alluded; and, in order to answer it, we must look through the *Companies (Winding-up) Act*, 1890, bearing in mind that, apart from the Act of 1890, there was power under sect. 115 of the *Companies Act*, 1862, to summon persons who are described in very large language: "Any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company"; and the Court may require any such person to produce books and so on. That power of the Court to summon such persons still exists; it has not been repealed in any way; but it has been supplemented by a still further power, to which I will now allude.

The Official Receiver is appointed to act in these matters of winding up by the 4th section of the Act of 1890. He has duties, and very serious and responsible duties, cast on him, and of course he is officially responsible for the proper discharge of

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those duties. Amongst other things we find, in sect. 8, what he has to do. I will read it, because it is material with reference to the controversy that has arisen in this case: "Where the Court has made an order for winding up a company, the Official Receiver shall" (it is a part of his duty), "as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court (*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and, (*b*) if the company has failed as to the causes of the failure; and, (*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof." Then sub-sect. 2: "The Official Receiver may also, if he thinks fit, make a further report, or further reports"; so that he may make as many as he likes, as often as he likes, and at as short intervals as he likes, "stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court"—that is to say, he may upon his responsibility, if he thinks fit, make a report stating that in his opinion some fraud has been committed by some person in the promotion or formation of the company, or by some director or other officer of the company since its formation, and he may report anything else which he thinks desirable. Upon that comes this provision—we pass now from the Official Receiver to the Court—sub-sect. 3: "The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company." Then come some other provisions, which are comparatively unimportant: the Official Receiver is to take part in the

examination; the liquidator, and any creditor or contributory, may also take part in the examination; and the Court may put such questions to the person examined as it thinks fit. Sub-sect. 7 is important: "The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost, prior to such examination" (this must be a person who has been ordered to be examined), "be furnished with a copy of the Official Receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit." Then comes sub-sect. 9, providing before whom a public examination shall be held.

Now, it is obvious that the power here given to the Court goes much further than the power which was conferred by sect. 115 of the *Companies Act*, 1862. It not only in terms applies to persons who have been connected in any way with the promotion or formation of the company, as to which there may be a doubt under sect. 115, but it alters the whole character of the examination. The examination under sect. 115 was an examination in private. This is an examination in public, and it is an examination in which any creditor or contributory may take part. It is, therefore, a very serious matter. It is all very well to say that it does not hurt a man to be examined; but we know perfectly well to what length these examinations go, and it is a very serious matter indeed to be examined under this section.

The question then is, How is the Court which makes an order for examination under sub-sect. 3 to satisfy itself that the person to be examined has taken some part in the promotion or formation of the company, or has been a director or officer of the company? If we were to look at the section alone, but bearing in mind those principles which underlie the administration of

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justice everywhere in *England*, we should suppose that there would be some machinery for ascertaining in the presence of the person to be examined whether he was such a person as is referred to in the statute,—we should suppose that this question would be tried upon notice to the person who had to be examined. But when we come to think it out, and see what such a conclusion involves, we see that it would render the sub-section almost unworkable, because, if you are to give a person notice that it is proposed to have him examined on the ground that he has taken part in the promotion or formation of the company, or has been a director or officer, we may have a decision by the Judge, an appeal to this Court, and finally an appeal to the House of Lords, upon the question whether he is liable to examination; and long before any examination could be obtained the delay would render the examination practically useless. An interpretation which leads to such inconvenient consequences can hardly be correct. I do not go the length of saying that an *ex parte* order for examination is right—it is not necessary to decide that; but I do point out the difficulty of holding that an *ex parte* order is wrong. In this particular case it is not necessary to decide whether an order for examination can or cannot be made *ex parte*; and I shall assume, therefore, that it can, reserving the difficult and important question whether it can or cannot until that question comes to us to be decided.

This case is comparatively easy. Supposing the order can be made *ex parte*, upon what is the Judge to form his opinion? Now, it appears to me that, upon looking at sub-sects. 2 and 3 of sect. 8, it must be upon the report of the Official Receiver. It is suggested that it can be done upon a mere verbal statement made by the Official Receiver to the Judge under rule 71 of the Rules of 1890, which says: "The consideration of the report shall be before the Judge of the Court personally in Chambers, and the Official Receiver shall personally, or by counsel or solicitor, attend the consideration of the report, and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require." That, of course, is quite right. The Official Receiver is the officer of the Court, and the Court is entitled to have his assistance in any

matter, and to have any information which he can give; but it does not follow that the Court can make such an order as this upon a mere verbal statement made in Chambers which cannot be tested by anybody. When you come to look at sub-sect. 2, you see that the Official Receiver in his subsequent report may state this—it is something very definite—whether in his opinion any fraud has been committed by any person, not whether in his opinion it is desirable to examine *X.*, *Y.*, and *Z.* about the formation of the company, but whether in his opinion any fraud has been committed; and then sub-sect. 3 says: "The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion . . . ." shall be examined.

At first I was disposed to think that "after consideration of any such report" might include a report under sect. 8, sub-sect. 1; but upon reconsideration I do not think so. It appears to me that "after consideration of any such report" means any such further report as is referred to in sub-sect. 2; and my reason for that is, that the subsequent language of sub-sect. 3 seems to be adapted to the case in which an opinion is expressed under sub-sect. 2 that there has been fraud. I do not understand that, if the Official Receiver merely states in his preliminary report that further inquiry is desirable, the Court has any jurisdiction upon that to make an order that somebody shall be examined under sub-sect. 3. In order to give the Court jurisdiction, it appears to me that the least that is required is that there shall be a report upon the responsibility of the Official Receiver, that in his opinion some fraud has been committed, and that the persons whom it is proposed to examine answer the description in sub-sect. 3. Anything short of that would be, I think, to open the door to a course of action such as would make an English Judge shudder. Any other construction would leave it open to the Court, upon mere information, without any opportunity of testing it, without any power of holding the Official Receiver responsible for it, to make an order that *X.*, *Y.*, and *Z.* should be publicly examined. So to construe the Act would, as it appears to me, be contrary to every principle of justice. I am prepared to go this length, which is sufficient

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for the present purpose, that assuming that these orders can be made *ex parte*—which I am rather disposed to think they can—the least that is necessary is that upon the responsibility of the Official Receiver there shall be in writing an opinion by him that some fraud has been committed, and that the person whom it is proposed to subject to this public examination comes within the category in sub-sect. 3. Upon that, I think, the Court may act. In the present case there is no such report; the Court has acted *ex parte* upon a report which falls far short of what is requisite. That report may have been supplemented by something stated in Chambers, but I think that is not enough; if the Court acted on such a verbal statement, there would not be sufficient protection to the persons who are sought to be made subject to these sections. It is stretching the Act to construe the words "any person who has taken" as "any person who is reported to have taken"; but I think that such stretching is required by the context, because the expression in the Act is, "the Court may, after consideration of any such report"; and if you get a report coming up to the mark, and reporting the person to have taken part in the promotion of the company, I think the Court has power to order examination, although the language is "any person who has taken."

I come, therefore, to this, that, assuming these orders can be made *ex parte*, as to which I say no more, it appears to me that this order cannot possibly stand, and that, if we allowed it to stand, we should be opening the door to great oppression upon innocent people. I do not mean to say for a moment that the Official Receiver would do otherwise than what he thought right, and still less would the Judge; but the power given by the Legislature under this section is a very stringent power, and requires to be construed and limited according to those principles of justice which underlie everything in this country.

In my opinion, therefore, this order must be discharged with costs.

LOPES, L.J.:—

If we were not differing from the learned Judge below, I should think it unnecessary to add anything to what has been so fully

stated; but, as the matter is an important one and we are differing from the learned Judge below, I desire in very few words to express my view.

Mr. *Barnard* has been summoned under sect. 8 of the Act of 1890, for a public examination, and it may be remarked that this is a new proceeding, and, no doubt, a very valuable and salutary one in many cases which may arise. I do not for a moment doubt that further investigation into this case is desirable; I think that is abundantly clear; but a very different question from that arises here. The question is whether Mr. *Barnard* is subject to the provisions of sect. 8, sub-sect. 3.

I will observe, in the first place, with regard to sect. 8 and its sub-sections, that sub-sect. 3 and those which follow introduce very drastic and severe proceedings. I do not propose to read the section again; but in my opinion the procedure under sub-sects. 3 to 9, is directed against wrong-doers.

Now, the question that arises in this case is, What ought a Judge who is proposing to put in force the provisions of this section as to examination to have before him in order to justify him in proceeding under them? It seems to me that sub-sects. 2 and 3 are to be read together. I say nothing about sub-sect. 1, because it seems to me that what that sub-section provides for is only a preliminary report. Then sub-sect. 2 provides that, "The Official Receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed"—by whom? "by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." He, therefore, under that sub-section, is authorized to make a report in which he is to state "whether in his opinion there has been any fraud committed by any person in the promotion or formation of the company, or by any director or other officer of the company, in relation to the company, since the formation thereof." Then sub-sect. 3, provides that, "The Court may, after consideration of any such report." Now, what is the meaning of "such report"? In

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my opinion, the word "such" refers, not to the report which is contemplated in sub-sect. 1, but to the report or reports which are contemplated in sub-sect. 2. "The Court may, after consideration of any such report, direct"—what? "that any person who has taken" (I read that as "who is stated by such report to have taken"—I cannot read it in any other way having regard to the words "such report" which precede it, referring, as I have already said, to the report mentioned in sub-sect. 2) "any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court . . . . and be publicly examined. . . ."

Now, having regard to the words of those two sub-sections, what ought the learned Judge to have before him in order to justify a proceeding under the 3rd sub-section? In my opinion it is a condition precedent to his jurisdiction that he should have before him a report to the effect that the person who is intended to be summoned for public examination should have been concerned in the promotion or formation of the company, or been a director or officer of the company. It is a condition precedent that there should be a report stating that in effect, and unless he has such a report before him, it appears to me that he has no jurisdiction to act under the provisions of the section.

I do not desire myself, on the present occasion, to express any final opinion whether the application for this public examination may be *ex parte* or not, as it is unnecessary in the present case to do so. I am inclined to agree with the view that has been expressed by my Brother *Lindley*, and can scarcely think but that it may be *ex parte*. Were we to hold otherwise, a nearly endless litigation on an interlocutory and preliminary point might arise which would make the provisions of this section almost useless; but I again say, I reserve the question for further consideration when it arises. I may add, that I cannot see that the construction we put upon this section raises any difficulty, because I am of opinion that, if there is any doubt as to whether a certain person is a promoter or not, or is brought within the provisions of this section or not, proceedings may be taken under sect. 115 of the Act of 1862 for the purpose of obtaining evidence that he does come within those provisions. I cannot see any reason why, if it is

ascertained by a proceeding under sect. 115 of the former Act that he was a promoter, a subsequent proceeding may not be taken against him under sect. 8 of the later Act.

The conclusion, therefore, to which I come is this, that in order to justify the public examination of any person under the provisions of this Act, that person must be found by the report to be a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company. I cannot think that any oral evidence can be given outside the report. It seems to me that, unless there is a report in writing to the effect I have stated, there is no jurisdiction to act under the provisions of these particular sub-sections. No report to any such effect was before the learned Judge. I think, therefore, that this order should be discharged.

A. L. SMITH, L.J.:—

The question for our consideration is whether Mr. Justice *North* had power to make the order he did ordering the public examination of Mr. *Barnard* under sect. 8, sub-sect. 3, of the Act of 1890. I am alive to the fact, from what I have been told, that our judgment will alter the practice which has been in vogue, as I understand, since the passing of this Act in 1890; but upon having this case argued, and my attention called specifically to sect. 8, I cannot myself doubt that sub-sect. 3 of this section, when it states that "The Court may, after consideration of any such report," is dealing only with the further report or further reports which the Official Receiver can make under sub-sect. 2 of that section; and that the words which I have read do not refer back to the preliminary report mentioned in sub-sect. 1 which is to be made by the Official Receiver. Having arrived at this conclusion, it seems to me that the point we have to decide to day is free from doubt and ambiguity. If sub-sect. 2 and sub-sect. 3 are to be read together, and sub-sect. 1 is not to be incorporated with these two sub-sections, then it seems to me to give the Judge jurisdiction to direct that a person shall be publicly examined under this section only when there is a report of the Official Receiver stating, amongst other things, that in his opinion a fraud has been committed by some person or persons

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who has or have taken part in the promotion or formation of the company, or by some director or other officer of the company, in relation to the company since its formation, and unless that report in writing is forthcoming before the Judge, he in my judgment has no jurisdiction to direct any other person who is not implicated in that report to be examined publicly under sect. 8, sub-sect. 3.

With regard to the question whether this direction can be obtained *ex parte* or not, I simply reserve what I have to say if it ever comes up again; but the inclination of my opinion is that it can be.

Solicitors: *Michael Abrahams, Sons, & Co.*; *Solicitor to the Board of Trade.*

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In re TRUST AND INVESTMENT CORPORATION OF SOUTH AFRICA.

[9 of 1892.]

In re BERTRAM LUIPAARD'S VLEI GOLD MINING COMPANY.

[341 of 1891.]

Company—Winding-up—Public Examination of Promoters or Officers—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Companies (Winding-up) Rules*, 1890, *r.* 71.

An order for public examination under the *Companies (Winding-up) Act*, 1890, s. 8, sub-s. 3, may be made if the Official Receiver has made a further report under sub-sect. 2, shewing, though not necessarily stating in express terms, his opinion that fraud has been committed by some person in the promotion or formation of the company, or by some director or officer in relation to the company since its formation; and that the person whom it is proposed to examine has taken part in the promotion or formation of the company, or has been a director or officer of the company, and it is not necessary that the report should allege him to have been a party to the fraud.

Such order may be made *ex parte*, leaving the party to move to discharge it if he alleges it to have been made without jurisdiction.

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THE first named of these companies, the *Trust and Investment Corporation of South Africa*, was incorporated as a limited com-

(1) *Ante*, p. 307.

pany on the 8th of February, 1890, and an order for winding it up was made on the 30th of January, 1892.

On the 14th of June, 1892, the Official Receiver made his preliminary report under sect. 8, sub-sect. 1, of the *Companies (Winding-up) Act*, 1890, and therein stated (*inter alia*) to the effect that the nominal capital was £204,000, divided into 200,000 ordinary and 4000 founders' shares; that of the former 33,865 had been issued; that the estimated amount of assets was £32,150, and the estimated amount of liabilities expected to rank for dividend, £14,992; that the failure of the company was attributed by the directors to their inability to realize securities against which the company had accepted bills and given guarantees in connection with a light railway in *Ireland*; and that, in the opinion of the Official Receiver, there were matters relating to the promotion, formation, and failure of the company, and especially the conduct of the business thereof, in connection with which further inquiry was desirable.

On the 30th of June, 1892, the Official Receiver made a further report, which contained statements to the following effect: That the promoters were stated by the directors to have been *M.* and *S.*; but that it was believed that other persons, whose names had not been disclosed, were also actively interested in the promotion of the company; that it was alleged by the directors that *M.*, in accordance with an agreement of the 8th of February, 1890, undertook to defray the costs of the promotion of the company in consideration of an allotment of 3000 fully paid-up founders' shares of £1 each; that this agreement had not been produced, but was referred to in an agreement filed with the Registrar of Joint Stock Companies, dated the 21st of September, 1890, under which the 3000 shares were allotted; that the directors and officers, and also *S.*, had been called upon to produce the agreement of the 8th of February, 1890, but pleaded ignorance as to its whereabouts; that the prospectus stated that the subscribers for a portion of the founders' shares would discharge the whole of the preliminary expenses of the company (except brokerage) up to the first allotment; that it appeared by the company's books that some of the expenses incidental to promotion (other than brokerage) were paid by the company; that it

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appeared from the books that at or about the date of the issue of the original prospectus the company instructed one of their brokers to make a market in the shares of the company, and, as a result of various dealings in such shares, the company had to pay a considerable sum to settle differences on the account; that according to the prospectus the principal business to be undertaken by the company was to invest in sound South African securities; but it did not appear from the books that dealings of any importance took place in securities of that nature; that the articles provided that the company's funds should not be employed in the purchase of its shares or in making advances on its shares, but it appeared from the books that the directors had made advances on the security of founders' shares to the amount of £2600; that there were irregularities in the company's books, "made, it would appear, with a view to concealing debts due to the company." The report concluded thus: "The Official Receiver reports to the Court that, in his opinion, further inquiry is desirable as to matters relating to the promotion, formation, and failure of the company, and the conduct of the business thereof, and that for the purpose of a full investigation being made the several persons in the schedule hereinafter mentioned should be publicly examined."

The report gave in a schedule the names of ten persons, and in a column headed "Connection with the Company," were set opposite to their respective names the following descriptions. Each of the first two was described as "promoter," four others respectively as "director," another as "late director," and the other three respectively as "secretary," "late secretary," and "auditor."

The Official Receiver on the 7th of July took out a summons, asking that a day might be appointed for the consideration of the two reports, and that the persons named in the schedule to the summons might be directed to attend to be publicly examined. The persons so named were the ten persons named in the schedule to the report of the 30th June. The application was *ex parte* in Chambers.

The *Bertram Luipaard's Vlei Gold Mining Company* was incor-

porated on the 20th of February, 1889, and an order for winding it up was made on the 27th of February, 1892, on the petition of a shareholder.

The Official Receiver by his preliminary report of the 5th of July, 1892, found to the effect that the capital of the company was £60,000 in £1 shares, and was afterwards increased to £120,000; that of the shares 13,525 had been issued as fully paid to the vendor or his nominees, and that the only other shares issued were those to the signatories of the memorandum and articles, making a total issue of 13,532; that the assets were estimated at £14 7*s.*, and that there were no liabilities to creditors; that the failure of the company was attributed by the secretary to the action of the directors in allotting the above shares before the company had possession of any property, and to the cancellation of the purchase contracts; and that in the opinion of the Official Receiver further inquiry was desirable into matters relating to the promotion, formation, and failure of the company and the conduct of the business thereof.

By a further report dated the same day the Official Receiver reported to the effect (*inter alia*) that the company was formed to acquire and work certain mining claims in *South Africa*, and that a contract was entered into for the acquisition of twenty-five mining claims at the price of £5000 cash and 40,000 fully paid-up shares; that the business was carried on at the office of the company's solicitor, and the secretary was a clerk in his employment; that the signatories appeared to have been youths, and to have been obtained by the solicitor, and one of them was a lad of fourteen employed in a City office; that in February, 1889, a prospectus was issued asking subscriptions for 60,000 shares, and stating that 20,000 had been applied for by the directors and their friends; that, so far as could be ascertained, only 4418 shares were ever applied for, and the application moneys were stated to have been returned; but the company's books contained no record of the repayment; that on the 22nd of May, 1889, a second contract was made for the purchase of further claims, and the consideration was increased to £105,000, of which £5000 was to be in cash and for the £100,000 in fully paid-up shares; that as regarded the first twenty-five claims, the report of a local surveyor, received in October, 1889, was so unfavourable that the

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agreement for purchase was rescinded. "That the company as a mining undertaking has never had any existence whatever, and its only transactions have been in regard to the issue of vendors' shares. On the 20th of May, 1889, prior to the receipt of any information upon the value of the properties, 46,249 fully paid-up shares were allotted to the nominees of the vendor, notwithstanding that the company had not then and has never obtained possession of the property in respect of which the shares were allotted, and these shares were immediately placed with several firms of stockbrokers for sale and disposed of to the public to the extent of £13,525." That these 13,525 shares appeared to have been issued with the knowledge and consent of the solicitor, and the company had received no benefit whatsoever therefor. And the report concluded: "The Official Receiver is of opinion that, for the purpose of a full investigation being made into the promotion and formation of the company and the circumstances of the issue of the vendors' shares and the consideration therefor, the several persons in the schedule hereto should be publicly examined."

The schedule contained the names of twelve persons, and in a column headed "Connection with the Company" the relation of each to the company was set opposite to his name: "the secretary," "the solicitor," "signatory to the memorandum and articles of association," "director," "power of attorney for the vendor," "the intermediary vendor."

The Official Receiver, as in the former case, took out a summons for an order to have these persons publicly examined. This application also was *ex parte* in Chambers.

It will be observed that the Official Receiver did not by his report in either case say in so many words that, in his opinion, any fraud had been committed.

Shorthand notes of the judgments of the Court of Appeal in *Ex parte Barnard* (1) were produced.

VAUGHAN WILLIAMS, J., gave the following judgment in each of the cases:—

In order to determine whether I ought to direct an examination of the persons mentioned in the schedule to this summons,

(1) Reported *ante*, p. 307.

or any of them and which of them, I ought to refer to the principles laid down in the judgments of the Lords Justices in *Ex parte Barnard.*

Lord Justice *Lindley* in that case says that the least that is necessary is that upon the responsibility of the Official Receiver there shall be in writing an opinion by him that some fraud has been committed by the person to be subjected to this examination.

Lord Justice *Lopes* expresses himself somewhat differently, he says: "In my opinion it is a condition precedent to the jurisdiction of the Judge that he should have before him a report to the effect that the person who is intended to be summoned for public examination should have been concerned in the promotion or formation of the company, or been a director or officer of the company."

Lord Justice *Lopes* does not, like Lord Justice *Lindley*, go on to say that the report must state the opinion of the Official Receiver that some fraud has been committed by the person so to be subjected to this public examination. But I think that the earlier part of his judgment makes it clear that he means this, for not only does he express generally his concurrence with the view of Lord Justice *Lindley*, but in his judgment he says that the Official Receiver in his report is to state whether or not in his opinion there has been any fraud committed by any person such as those mentioned in sub-sect. 2 of sect. 8.

At the same time it must be observed that the fact that Mr. *Barnard*, the person directed in that case to be examined, was not stated in the report to have been a person who had taken a part in the promotion or formation of the company, or a director or officer of the company, was a sufficient reason for discharging the order upon the basis of the conditions which the Lord Justice in terms laid down as necessary to justify an order for examination of the person in question.

Lord Justice *A. L. Smith* says, that to give the Judge jurisdiction to direct that a person shall be publicly examined under sect. 8 of the Act of 1890 there must be a report of the Official Receiver stating, amongst other things, that in his opinion a fraud has been committed by some person in the promotion or formation of

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the company, or by a director or other officer, and that unless there is such a report in writing the Judge has no jurisdiction to direct any other person who is not implicated in that report to be examined.

It seems to me from this that Lord Justice *A. L. Smith* also thinks that the report must shew that the person sought to be examined is implicated in the opinion of the Official Receiver in frauds mentioned in the report. I had arrived, in my judgment which was reversed, at the conclusion that it was sufficient if the further report in writing stated matters which, in the opinion of the Official Receiver, it was desirable to bring to the notice of the Court, and that then the Judge had jurisdiction to direct the examination of any person who had taken part in the promotion or formation of the company, or had been a director or officer of the company, provided in the opinion of the Judge such matters so stated in the report made it probable that such person had taken such part or been such director or officer, and provided the matters stated, in the opinion of the Judge, made it desirable that such person should be examined as to the formation or promotion of the company, or as to the conduct of the business of the company, or as to his conduct or dealings as a director or officer of the company (see the last words of sub-sect. 3). It appears now that this view was wrong, and that the Official Receiver before the examination, and without the assistance of it, must state his opinion that the person sought to be examined (to ascertain what his conduct or dealings in relation to the company have been) has committed some fraud.

I do not think that the Court of Appeal can mean that the Judge is to act on this opinion unless the report states the facts which led the Official Receiver to the conclusion; and it may be that, according to the judgment of the Court of Appeal, if the facts stated suggest fraud in the person sought to be examined, the Judge may direct the examination without the expression of any personal opinion by the Official Receiver, provided such person appear upon the face of the report to be a person who has taken part in the promotion or formation of the company, or has been a director or officer.

This is the most convenient view to take of the judgment in

practice; because, if one takes a case where the report makes it clear that a fraud has been committed by some person or persons concerned in the promotion, or by some director or directors or other officers, but does not indicate at all by which person, director or officer the fraud has been committed, it may very well be that the Official Receiver has not the materials to enable him to express an opinion as to the guilt or fraud of any individual. I think, however, that I shall best perform my duty by following the terms of the judgment, and not speculating as to whether the Court of Appeal intended any such limitations as I have suggested, and by leaving it to the Court of Appeal to place such limitations themselves if any were intended; and, inasmuch as neither of these reports states any opinion of the Official Receiver that some fraud has been committed by any one of the persons sought to be subjected to public examination, refuse to give any direction. The facts stated by the report suggest fraud, and suggest fraud in some of the directors, officers, or promoters; but the report does not comply with the terms of the judgment of Lord Justice *Lindley* and the other Lords Justices, except, perhaps, that of Lord Justice *A. L. Smith.*

The applications must, therefore, be refused.

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The Official Receiver appealed. The appeals were heard on the 3rd of August, 1892.

Sir *E. Clarke*, S.G., and *Ingle Joyce*, for the appeal:—

It has been thought that this Court laid down in *Ex parte Barnard* that a person can only be ordered to be publicly examined if there has been a report naming him as suspected of fraud. We submit that the Court did not intend to lay down this, which goes far beyond what was necessary for the decision, and that the order may be made either on a report under sect. 8, sub-sect. 1, or on one under sub-sect. 2, "any such report" being referable to either of the reports before mentioned; and that the power arises whenever the Official Receiver has made a report shewing that a further investigation is necessary, and that the persons whom it is proposed to examine come within the class of persons mentioned in sub-sect. 3. The 2nd sub-section is to be

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read disjunctively. It cannot be intended that the Official Receiver should be bound to report on all the subjects there mentioned.

[LINDLEY, L.J.:—We decided in *Ex parte Barnard* that the report referred to in sub-sect. 3 is a report made under sub-sect. 2, and that before an examination under sub-sect. 3 can be ordered there must be a report finding fraud. By that I abide; but if I said what in the shorthand note I am represented to have said, that the report must allege the person to be examined to have been a party to the fraud, I did so inadvertently.

LOPES, L.J.:—I laid down nothing more than that the report must find that the person to be examined fills one of the positions mentioned in sub-sect. 3, and I did not understand the Lord Justice *Lindley* to have held that he must have been found a party to a fraud.]

Proceeding, then, on the ground that fraud must be found, we say it is not necessary that the Official Receiver should state his conclusion in terms that there has been fraud. If he states circumstances which amount to fraud, that is enough, though he does not go on to say that fraud has been committed. The application, we contend, was properly made *ex parte*. The order is to be made after the consideration of the report. By rule 71 of the Rules of December, 1890, the report is to be considered by the Judge personally in Chambers, and there is not a hint of any one but the Official Receiver attending. The form of order (Form 37) in the Rules of 1890 is manifestly framed on the view that it is *ex parte*, for it does not refer to any one as being heard; whereas in Form 34, relating to a matter which would not be dealt with *ex parte*, there is an indication of other parties being heard. Whether it is necessary that the Official Receiver should find that fraud has been committed at all need not be decided in the present case; but, assuming that it is, there is no reason for limiting the power of examination to persons found to have been parties to the fraud. If fraud has been committed in the formation of the company, that is a sufficient reason for examining any person who took part in its formation, though the Official

Receiver may not have information which enables him to allege that this particular person was a party to the fraud.

[They referred to shorthand notes of *Ex parte Barnard* (1) and to a report of it (2).]

LINDLEY, L.J.:—

I do not think that there is any real difficulty in this case as regards the fact that the Official Receiver's report does not contain any expression of opinion that the persons whom it is proposed to examine were parties to a fraud. The difficulty which has arisen is attributable to some words reported to have been used by me, and which, if I did use them, were uttered unintentionally in the case of *Ex parte Barnard.* In a report of that case, which was referred to before us, and in a shorthand note read before Mr. Justice *Vaughan Williams*, I am reported to have said twice over that in order to justify an order for public examination under the *Companies (Winding-up) Act*, 1890, s. 8, sub-s. 3, the least that is required is that there should be a written report upon the responsibility of the Official Receiver that in his opinion some fraud has been committed by the person to be examined. If I did say that, I expressed myself incautiously, because that was not the meaning of any of us.

I will proceed to state exactly what I understand to be the view taken by the Court on that occasion, and the view taken by the Court on this occasion.

First of all, we stated in *Ex parte Barnard*, intentionally and deliberately, that "such report" in sub-sect. 3 means the report referred to in sub-sect. 2. That produces no inconvenience, and I am satisfied that it is the true construction, and I abide by it.

Secondly, we have to decide now what we had not to decide in *Ex parte Barnard*, namely, whether these applications can be made *ex parte.* I think that the expression, "after consideration of any such report," in sub-sect. 3, shews that a summons and notice to the person ordered to be examined are not contemplated. That is strengthened by the form and order to which

(1) Reported *ante*, p. 307. (2) 40 W. R. 627.

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Mr. *Ingle Joyce* called attention, namely, Form 37 and rule 71. But, then, this, of course, will follow: that if the Court makes an order directing that somebody shall be examined upon the footing that he is a person falling within sub-sect. 3, it must be competent for that person to apply to the Judge to discharge that order upon the ground that he is not within sub-sect. 3, otherwise gross injustice would be done. In most cases there will be no question whether a person comes within sub-sect. 3. There may be some question as to whether a person has taken part in the promotion or formation of the company; but as to whether he has been a director or officer of the company there will be no controversy. Therefore it is convenient that the order should be made *ex parte*, and I do not see that there is any injustice in saying that it can be so made. I am convinced that this was contemplated by the orders, rules, and forms, and we decide accordingly, with the qualification I have mentioned, that if a man disputes his being within sub-sect. 3, he can apply to discharge the order on the ground that the Judge had no jurisdiction to make it. He cannot, however, question the propriety of making the order if the learned Judge had jurisdiction to make it, and there can be no appeal on such a point.

Now, what are the materials upon which the Court ought to act? In *Ex parte Barnard* we had no materials, for there was no report that *Barnard* had taken any part in the promotion or formation of the company or been a director or officer, and we held that a verbal statement by the Official Receiver to the Judge that *Barnard* had been a promoter could not be acted upon.

Let us now look at the Act of Parliament. The report referred to in sub-sect. 3 is a report under sub-sect. 2. Such report is to state the manner in which the company was formed, a provision which I do not suppose to be particularly material except so far as it throws light on the next sub-section, "Whether in his opinion" —that is, the Official Receiver's opinion—"any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof." Some report to the effect that some fraud has been committed is necessary. Then, what further is necessary is that the Official

Receiver shall make a report that *X. Y. Z.*, or whoever the people in his schedule may be, are persons who fill the characters enumerated in sub-sect. 3, that is to say, that they are persons having taken part in the promotion or formation of the company, or have been directors or officers of the company. That is enough. It is not necessary for the Official Receiver to draw an indictment against the person to be examined; and I feel certain that we said so during the argument in *Ex parte Barnard.*

In each of these cases we have two reports which are plain enough, not only a report under sub-sect. 1 that further inquiry is desirable as to the promotion, formation, or failure of the company, or the conduct of the business thereof, for these companies appear to be simply swindles, but a further report under sub-sect. 2 which shews that, in the opinion of the liquidator, frauds have been committed by persons in the promotion or formation of the company. It also shews that the persons directed to be examined are persons who fall within the classes enumerated in sub-sect. 3. That appears to me to be amply sufficient. I think, therefore, that Mr. Justice *Vaughan Williams* might have made an order, and ought to have made it, and I am satisfied that he would have made it if he had not been misled by what I am reported to have said, about "some fraud has been committed by the person to be examined." That is not in the Act, and, if I did say it, I did not intend to say it.

Lopes, L.J.:—

I adhere to what I said on the occasion to which Mr. Justice *Vaughan Williams* has referred. I find I said this, summing-up what I had previously said: "The conclusion, therefore, to which I come is this, that in order to justify the public examination of any person under the provisions of this Act, that person must be found by the report to be a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company." Then I say: "It seems to me that, unless there is a report in writing to the effect I have stated, there is no jurisdiction to act under the provisions of these particular sub-sections."

The judgment in *Ex parte Barnard* seems to have been

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somewhat misunderstood. I am perfectly clear what my view was, and I certainly thought it was the view of my learned Brethren, namely, that there must be a report that in the opinion of the Official Receiver a fraud had been committed by somebody, but that the particular person or persons who were parties to it need not be named in order to apply this sub-section.

With regard to the other point as to whether this application may be made *ex parte*, a point which on the previous occasion we did not decide, I am of opinion that the application may be made *ex parte*. I came to that conclusion not only for the convenient working of these provisions, but also in consequence of words that I find in sect. 8, sub-sect. 3, and also rule 72, which was made under the Act, and the form under the Rules, Form 37. Sect. 8, sub-sect. 3, says: "The Court may after consideration of any such report." Rule 72 says: "If the Court makes an order pursuant to sub-sect. 9 of sect. 8 of the *Companies (Winding-up) Act*, 1890, directing any person to attend for public examination"; and Form 37 is this: "Upon the application of the Official Receiver in the above matter, and upon reading the report of the Official Receiver made to the Court." All that shews that this is an application which may be made *ex parte*. An order is made, and then if a person so summoned has any objection to it he may take out a summons to rescind the order on the ground that he is not a person who comes within the terms of sub-sect. 3; and if he shews that, then, no doubt, the order will be discharged on the ground that there was no jurisdiction to make it. That seems to me a proper mode of proceeding, and I think that the discussion of the case has made the point free from doubt.

A. L. SMITH, L.J.:—

In my judgment the head-note of *Ex parte Barnard* (1), in the report to which we have been referred, must be altered. I am not sure that I had not a hand in making the head-note wrong by what I said in the last part of my judgment; but I certainly did not intend to say what this head-note says, although I think the reporter might well have thought I meant it. The head-note

(1) 40 W. R. 625.

runs: "The Court has no jurisdiction to direct a person to attend and be publicly examined under sect. 8 of the *Companies (Winding-up) Act*, 1890, unless it has before it a report in writing of the Official Receiver stating that, in his opinion, a fraud has been committed." That is right enough; but it goes on "by such person," that is the point that we have to decide to-day. I remember perfectly, as Lord Justice *Lindley* has stated, a discussion going on about an indictment; and I remember that we negatived the necessity of an indictment or anything like it being contained in the report.

I wish to point out that our judgments in *Ex parte Barnard* were given in a case in which there was no report by the Official Receiver that there had been fraud, and no report nor even a statement that *Barnard* had taken part in the promotion or formation of the company, or had been a director or officer of the company. All that was stated about him, and that did not appear in the report, was that he had been a subscriber for shares on the formation of the company. That was the case to which our remarks applied.

In order that the Official Receiver may obtain an order for personal examination, in my judgment he must make a report shewing that, in his opinion, a fraud has been committed by some person or persons who has or have taken part in the promotion of the company, or has or have been a director or officer of the company; and that the person to be examined comes within the category of a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company, but the report need not particularize the person supposed to be guilty of the fraud.

As to whether this order can be obtained *ex parte* or not, I am of opinion that it can, and I agree with what has been said by my Brethren on that question.

Solicitor: *Solicitor to the Board of Trade.*

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Restraint of Trade—Unreasonable Covenant.

R., a brewer, engaged *M.* as a traveller for procuring orders for and selling malt liquors, and also, if required by *R.*, aerated waters, to the class known as wholesale purchasing agents in a certain district. *M.* agreed that for two years after the determination of his employment he would not be concerned in selling malt liquors or aerated waters within a certain district. *R.* never dealt in aerated waters, nor required *M.* to obtain orders for them. *M.*, after leaving *R.'s* employment, became traveller to rival brewers within the prescribed district. *R.* brought an action, and applied for an injunction. *M.* insisted that the restriction was too wide, and therefore void. *Stirling*, J., construed the restriction as only prohibiting *M.* from selling wholesale, and held that the stipulation as to aerated waters was severable, and granted an injunction limited to selling malt liquors wholesale :—

Held, on appeal, that the agreement must be construed as prohibiting *M.* from selling wholesale or retail within the limit, and that the restraint was not greater than was necessary for the reasonable protection of *R.*, for that selling wholesale and retail were not two distinct businesses, but only different modes of carrying on the one business of selling malt liquors, that the selling malt liquors either wholesale or retail within the district might affect *R.'s* business, and that *R.* was entitled to restrain *M.* from selling malt liquors in any way within the district :—

Held also, affirming the decision of *Stirling*, J., that the stipulation as to aerated waters was severable.

By an agreement dated the 13th of September, 1890, between the Plaintiff, therein described as "of the city of *Bristol*, brewer," and thereinafter called "the employer," of the one part, and the Defendant, described as traveller, and thereinafter called "the traveller," of the other part, reciting that the traveller was in the service of the employer as clerk and traveller, on the terms of an agreement of the 20th of October, 1888, and that it had been agreed that that agreement should be determined as from the 30th instant, and that such agreement as thereinafter contained should be entered into, it was agreed that the traveller should serve the employer as his clerk and traveller for the eight counties herein named (mostly in *South Wales*), and for such

other counties as the employer should from time to time direct, as from the 1st of October, 1890, upon the terms thereinafter expressed, viz.:—

"1. The traveller shall and will diligently employ himself in such service in procuring orders for and selling beer, ale, porter, and other malt liquors, and also, if required by the employer, aerated waters, wines, spirits, cordials, tobacco, and cigars, for and on behalf of the employer, to the class of customers known in the employer's trade and business as wholesale purchasing agents only, and collecting accounts for the same, and in supervising such travellers and clerks as the employer may from time to time employ for the purpose of the trade with the said wholesale purchasing agents in the district for the time being allotted to the traveller, and in and about all matters connected with the said duties in such mode as the employer shall from time to time direct, and the traveller will attend at such places as the employer shall from time to time direct and appoint."

"4. The traveller will not, during the continuance of this agreement, be in any capacity whatsoever, directly or indirectly, engaged or concerned or interested in any other trade or business, or in soliciting orders for any other person, firm, or company, than the employer, but will devote the whole of his time and attention exclusively to the services hereby agreed to be performed by him."

Clause 7 provided for the remuneration of the traveller by a salary of £300 per annum, and a commission on all net moneys received by the employer in respect of commodities supplied by him on orders procured by the traveller or by any clerk or traveller employed by the employer under his supervision.

"8. Nothing herein contained shall in any way prevent the employer at any time during the continuance of this agreement allotting the whole or any part or parts of the district for the time being allotted to the traveller under these presents to any other traveller of the employer, in addition to the traveller, so far as the trade of the employer with wholesale purchasing agents is concerned, subject, nevertheless, to the provisions of clause 7 hereof. And it is expressly agreed that the traveller shall not be entitled to commission on any moneys received in respect of

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goods supplied or orders procured by or through such clerks or travellers as shall be employed by the employer in calling upon customers other than wholesale purchasing agents as aforesaid."

"11. And the traveller hereby further agrees that, for the considerations aforesaid, in the event of the determination of this service from any cause whatever, the traveller will not, without the previous consent of the employer, for a period of two years after such determination, directly or indirectly engage, or be concerned or interested in selling beer, ale, porter, or other malt liquors, aerated waters, wines, spirits, cordials, tobacco, or cigars, or in collection of accounts for the sale thereof, within 100 miles of the general post-office in *Cardiff*, whether on his own behalf or as a partner with, or agent, traveller, clerk, or servant of any other person, firm, or company."

The agreement was determinable by either party at three months' notice, and the employer was empowered to determine it immediately in case of any breach of the agreement by the traveller.

On the 12th of March, 1892, the Defendant wrote to the Plaintiff a letter, which was delivered on the 14th, giving three months' notice to leave the Plaintiff's employment.

The Plaintiff requested an interview with the Defendant, but was unable to obtain one; and on the 21st of March the Plaintiff wrote to the Defendant a letter which concluded: "If, as I can only suppose, you wish to avoid an interview, I cannot but assume that my interests will be best protected if you do not call on my customers during the time your notice is running; and, therefore, until you receive any further directions, you must please accept this as an instruction from me to that effect." The Defendant wrote back disputing the Plaintiff's right to prevent his calling on the customers, and continued to call on them. On the 1st of April the Plaintiff dismissed the Defendant from his employment.

After this the Defendant went about soliciting from the Plaintiff's customers orders for beer from a firm of brewers in *Birmingham*; and the Plaintiff brought this action to restrain him from violation of the agreement.

In May, 1892, the Plaintiff gave notice of motion before Mr. Justice *Stirling* for an injunction to restrain the Defendant from

directly or indirectly engaging, or being concerned in, or interested in, selling beer, ale, porter, or other malt liquors, or in the collection of accounts for the sale thereof, within 100 miles of the general post-office in *Cardiff*, whether on his own behalf or as a partner with, or agent, traveller, clerk, or servant, of any other person, firm, or company.

The Defendant, by paragraph 7 of his affidavit, filed in opposition to the motion, deposed, "That the Plaintiff's business consists exclusively of selling local beer is casks of 4½ gallons and upwards, and that he has no business or interest so far as I am informed, and verily believe, in selling aerated waters, wines, spirits, cordials, tobacco, or cigars, nor in the collection of accounts for the sale of such last-mentioned articles, and during the whole of my term of service I have not been asked by him to sell or promote trade in the same articles, nor has he, I am informed and verily believe, held any license for the sale thereof, or dealt therein. The Plaintiff is not a bottler of or seller of beer, porter, or other malt liquor in bottles."

The Defendant took two grounds of defence—(1.) that the Plaintiff had broken the agreement by forbidding the Defendant to call on the Plaintiff's customers during the interval between the giving and the expiration of the Defendant's notice, and was, therefore, precluded from suing to enforce the agreement; (2.) that the restraint on trade was void as being too wide. On the first point, Mr. Justice *Stirling* thought that the Plaintiff would probably establish at the hearing that the Defendant's conduct justified his summary dismissal, and that the Plaintiff had not broken the agreement. As to the second point, his Lordship thought that on the true construction of the agreement, the stipulation as to aerated waters, &c., was severable, and that as regarded malt liquors, the prohibition was only applicable to wholesale trading, and was reasonable—it being shewn that the Plaintiff's business extended so far as to make the 100 mile limit not unreasonable. His Lordship, therefore, granted an injunction in the terms of the notice of motion, with a proviso that it was not to prevent the Defendant from directly or indirectly engaging in, or being concerned or interested in, selling by retail beer, ale, porter, or other malt liquors, or in collection

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of accounts for the sale thereof either on his own behalf or otherwise.

The Defendant appealed from this order, and it was agreed that the hearing of the appeal should be treated as the trial of the action.

Buckley, Q.C., and *Swinfen Eady*, for the Appellant:—

We say that the restraint is too wide, and, therefore, illegal. The Plaintiff's business was selling what is called "local beer" in casks, which was a wholesale business. To determine whether a restraint is legal, you must dismiss any view to consequences, and determine what the agreement means, just as where the question is whether a limitation is void for remoteness. The construction must first be ascertained, and it is then to be decided whether the stipulation is valid. The prohibition here is in terms calculated to cover a retail business, and we submit that Mr. Justice *Stirling* was wrong in giving it a more limited construction. It would prohibit the keeping a public-house, and a restraint against sale by retail is unnecessary for the protection of a wholesale dealer. It is a case where a man who has left an employment covenants that he will not carry on either of two trades one of which the employer does not carry on.

[LOPES, L.J., referred to *Mills* v. *Dunham* (1), where the words of restraint were held to be limited by the scope of the agreement.

LINDLEY, L.J.:—Is it clear that opening a public-house where beer not sold by the Plaintiff was consumed would not diminish the Plaintiff's profits?]

It could not do so directly, for the people who consume beer at a public-house are quite a different class from those who buy beer in four-and-a-half gallon casks. It is possible, indeed, that the setting up a public-house in which beer other than the Plaintiff's was sold might, in some few instances, affect the Plaintiff's business with wholesale agents who supplied public-houses in the neighbourhood; but such an indirect damage is too remote. In *Perls* v. *Saalfeld* (2), the covenant was construed

(1) [1891] 1 Ch. 576. (2) [1892] 2 Ch. 149.

according to its terms, and not cut down as has been done here. In *Davies* v. *Davies* (1) the whole subject of restraints of trade is considered by the Court of Appeal, and the Court there refused to enforce an agreement to retire from business "so far as the law would allow." In *Baker* v. *Hedgecock* (2), Mr. Justice *Chitty* refused to restrict a general covenant not to carry on any business to a particular business, and held the restraint void.

[LOPES, L.J.:—The covenant in *Mills* v. *Dunham* (3) was very like the present one.]

It was construed by the reference to "customers." The order of MR. Justice *Stirling* admits my argument. He makes an order in the terms of the covenant, and then engrafts on it a proviso that the Defendant is not prevented from selling by retail. The covenant is wide: it would prevent carrying on business as a publican, or selling beer in bottles by retail. The Court will not mould a covenant so as to make it reasonable: *Davies* v. *Davies*. The parties must make terms for themselves, and then the Court will decide whether the restraint is reasonable.

[LOPES, L.J., referred to *Horner* v. *Graves* (4) and *Hitchcock* v. *Coker* (5), as giving the test of reasonableness.

LINDLEY, L.J.:—There can be no doubt as to the rule. The only difficulty is in the application of it to the facts.]

The Plaintiff here is a wrong-doer, as he deprived the Defendant of the opportunity of earning his commission during the three months.

[The COURT expressed an opinion that the Defendant's conduct had been such as to justify his summary dismissal.]

Hastings, Q.C., and *Christopher James*, for the Respondent:—

[LINDLEY, L.J.:—Would not this agreement prevent the Defendant from setting up as a publican, and is that a reasonable restraint?]

We submit that it would not, and that Mr. Justice *Stirling's* restricted view of the agreement is the true one. But suppose it

(1) 36 Ch. D. 359.
(2) 39 Ch. D. 520.
(3) [1891] 1 Ch. 576.
(4) 7 Bing. 735.
(5) 6 A. & E. 438.

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would, we contend that the restraint is not to be considered too wide. *Tindal*, C.J., in *Hitchcock* v. *Coker* (1), lays down the rule (2) that where the restraint is greater than the protection of the other party "can possibly require," the restraint is void. This case and those which have followed it are referred to in *Rousillon* v. *Rousillon* (3), and it is there laid down in conformity with earlier cases that the *onus* lies on the defendant to shew that the agreement clearly extends beyond what was required for the plaintiff's protection. That is not shewn here. And indeed it is plain that the pushing the sale of other brewers' beer within the district, even though only by retail, must to some extent affect the Plaintiff. The agreement ought, however, we submit, to be construed as Mr. Justice *Stirling* has done. The principle of construing a document *ut res magis valeat quam pereat* is not excluded in these cases, as is shewn by the remarks in *Perls* v. *Saalfeld* (4), though the language must not be twisted for the purpose of making the agreement legal.

[They were stopped by the Court.]

Buckley, in reply:—

The covenant makes a *primâ facie* case against the Defendant. He defends himself by shewing that the covenant relates to two trades of which the Plaintiff only carries on one. That shifts the burden to the Plaintiff, on whom it then lies to shew that a retail business will interfere with him.

LINDLEY, L.J.:—

In this case we are asked to determine the true construction of a covenant not to carry on business.

The facts which we must have present to our minds before addressing them to the construction of the document on which the controversy turns are these. The Plaintiff is a brewer at *Bristol*. It does not appear more exactly from the recital in the agreement what the nature of his business is; but this is what the Defendant says of it in his affidavit: "That the Plaintiff's

(1) 6 A. & E. 438.
(2) Ibid. 454.
(3) 14 Ch. D. 351.
(4) [1892] 2 Ch. 149.

business consists exclusively of selling local beer in casks of 4½ gallons and upwards, and that he has no business or interest, so far as I am informed and verily believe, in selling aerated waters, wines, spirits, cordials, tobacco, or cigars, nor in the collection of accounts for the sale of such last-mentioned articles." It strikes one at once that on that affidavit there is nothing to shew to whom or by what means this "local beer" is sold. We only learn that it is sold, not in bottles, but in casks of four-and-a-half gallons and upwards.

The Plaintiff enters into this agreement with *Maddocks*, who is to act as his traveller. The first recital is that the traveller is in the service of the employer on the terms of an old agreement, which is to be replaced by the present one; and it is then agreed that "the traveller shall and will serve the employer as his clerk and traveller for the counties of *Cardigan*, *Pembroke*, *Carmarthen*, *Brecknock*, *Glamorgan*, *Hereford*, *Radnor*, and *Monmouth*, and such other counties or places as the employer shall from time to time direct." Then the 1st clause is: "The traveller shall and will diligently employ himself in such service in procuring orders for and selling beer, ale, porter, and other malt liquors, and also, if required by the employer, aerated waters, wines, spirits, cordials, tobacco, and cigars, for and on behalf of the employer, to the class of customers known in the employer's trade and business as wholesale purchasing agents only, and collecting accounts for the same." That is not co-extensive with the possible business of the employer (I do not say the actual business, as I do not know exactly what the Plaintiff's actual business is), for the Defendant is only to procure orders from a certain class of customers, there being possibly other classes. He is to sell only to "wholesale purchasing agents," and he does not say in his affidavit, into which I have looked carefully on this point, that the whole of the Plaintiff's business consisted in selling beer to such agents. The next important clause is the 4th. [His Lordship read that clause.]

Then clause 8 is important by reason of the last words, "that the traveller shall not be entitled to commission on any moneys received in respect of goods supplied or orders procured by or through such clerks or travellers as shall be employed by the

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employer in calling upon customers other than wholesale purchasing agents as aforesaid." This shews that the business contemplated is not a business confined to dealing with the people known as "wholesale purchasing agents," but extends beyond them. The Plaintiff might sell beer through the Defendant to wholesale purchasing agents, and might also have a considerable trade (no matter whether you call it wholesale or retail), in supplying beer in casks of four-and-a-half gallons and upwards to other persons and through other agents. I pass then to clause 11, on which everything turns. [His Lordship read the clause.]

Owing to differences which have arisen between the employer and the traveller, the traveller has left his employer's service, and the question arises, What does this covenant forbid, and is it valid in point of law? The first question is, What is the true construction of it? Mr. Justice *Stirling* appears to have read it as if it was confined to a wholesale business. I confess that I am unable to put that construction on it. I cannot read this covenant otherwise than literally. It seems to me to be open to no ambiguity, and it is to my mind impossible to reconcile the construction put on it by Mr. Justice *Stirling* with the last words of paragraph 8. I read it therefore exactly as it stands, that the traveller agrees that for two years he will not, without the previous consent in writing of the employer, directly or indirectly engage, or be concerned or interested, in selling beer, ale, porter, or other malt liquors within a certain area. I pass over the aerated waters.

Then comes the question whether that restriction is valid in point of law. It is said to be invalid because it is more extensive than the reasonable protection of the interests of the employer requires. Is it too extensive? I have attended very closely to Mr. *Buckley's* argument on that head, and I am unable to concur in the view he has suggested to us. It appears to me to be highly reasonable, and I think the attempt to persuade us to the contrary is based on a false analogy. The case has been argued as if the Plaintiff was engaged in one business and was stipulating for the protection of another business. That is not so. He is a brewer. His business is to sell beer. His object is to push his trade in a particular district, which I will

call for convenience *South Wales*. He engages the Defendant to do so, imposing these terms: "When you leave my service, you must not for two years sell beer at all in that district." Why is not that perfectly reasonable? He says: "You are not to sell beer in that district without my permission; if you want to sell my beer, of course you will get my permission to sell that; but you are not to sell beer in that district in competition with me." On what principle, either of business or law, are we to hold such a stipulation unreasonable? As regards the principle of law applicable to the case, I do not think that I can do better than refer to the passage in Lord Chief Justice *Tindal's* judgment in *Horner* v. *Graves* (1) which my Brother *Lopes* read, and which expresses exactly what the law is. He says (2): "The greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." Can we say here that the restraint is greater than is reasonably necessary to afford fair protection to the interest of this employer when we consider what his interest is? I see no difficulty in coming to the conclusion that, construing the prohibition literally, as I think we ought, it does not exceed the reasonable limit. As I said before, Mr. *Buckley's* argument is, that the wholesale business is one thing and the retail business another; and here is a gentleman who, carrying on business A wants to exclude the Defendant from carrying on business B as if the Plaintiff were a watchmaker, and wanted to restrain the Defendant from carrying on the business of an umbrella maker. It is nothing of the sort. The Plaintiff's business which has to be protected is selling beer in a particular district, and he says to his traveller, "When you leave me you are not to

(1) 7 Bing. 735. (2) 7 Bing. 743.

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compete with me in selling beer in that district." That appears to me to be perfectly reasonable.

I think the form of the injunction is more favourable to Mr. *Buckley's* client than it ought to be; and if the other side wished the proviso struck out, I should be for striking it out; but as they do not object to it, it may remain, though allowing it to remain is inconsistent with the principle on which we are deciding the case.

LOPES, L.J.:—

In cases of this kind, where a document contains a covenant in restraint of trade, as in all other questions of a similar kind, the first thing is to look at the agreement, not only at part of it, but at the whole of it. The business of the employer must be regarded and the duties of the employed; more especially the object of the covenant must be considered. Considering all those matters, the construction I put on this covenant is this, that it is a covenant not to sell beer, either wholesale or retail, within the prescribed time and within the prescribed limits. It may be remarked that that is the literal and grammatical reading of the covenant; and I think that the words which occur at the end of clause 8 go far to shew that the Plaintiff at the time when that contract was entered into contemplated not only the selling of beer by wholesale to purchasing agents, but also a retail business. I do not agree with Mr. Justice *Stirling* in the restricted construction which he put on the covenant, viz., that it only prohibited selling beer by wholesale. I think it not only relates to selling beer by wholesale, but also to selling it by retail. If that is the true construction, then the question arises, Is it too large or is it unreasonable? because a covenant of this kind, if it is unreasonable, cannot be enforced. In other words, is the restraint which is effected by the covenant larger than that which is necessary to afford a fair protection to the person in whose favour the covenant is made? No better test can be given of what such a covenant should be than the test given by Chief Justice *Tindal*. I venture with some diffidence to repeat what I myself said in the case of *Mills* v. *Dunham* (1):

(1) [1891] 1 Ch. 576, 587.

"The principle deducible from all the cases is that the question to be determined is, whether the restraint, having regard to all the circumstances of the case, and the nature of the employment, is greater than is necessary for the protection of the person in whose favour it is imposed." Now, is this covenant larger than is necessary to afford a fair protection to the person in whose favour it is made? I think not. I think Mr. *Buckley* was leading us a little astray when he said so much about two businesses. There are not really two businesses in this case at all. It is one business. The business is the business of selling beer. There are two modes of selling it, no doubt, wholesale and retail; but the business is one and only one. What was the object and meaning of this covenant? It was, as has been said by my learned Brother *Lindley*, "You are not to sell beer in competition with me without my permission within the prescribed time, and within the prescribed limits." It seems to me that that is not too large. It appears to me impossible to say that the selling of beer either wholesale or retail would not compete with the business of the Plaintiff, and in point of fact be in violation of what, to my mind, is the true construction of the covenant, and also in violation of its object and meaning. I think, therefore, that this appeal should be dismissed.

A. L. SMITH, L.J.:—

I am also of the same opinion. Speaking for myself, it seems to me that Mr. *Buckley* by his able argument has made the case as difficult to decide as it could be; but nevertheless I am of opinion that judgment must be in favour of Mr. *Graham Hastings'* client, upholding Mr. Justice *Stirling*, though not entirely on the ground on which he decided the case.

The law is not in dispute, and the short facts are these. The brewer, the present Plaintiff, wants to push the selling of his beer however it can be best sold; and he gets an agent, the present Defendant, to push his trade among a certain class called "wholesale purchasing agents." But, on the face of the agreement entered into between the Plaintiff and the Defendant, it is manifest that this is not the only medium through which the brewer sells his beer, though it is the only medium through

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which the Defendant was to sell it and obtain his commission from the Plaintiff. In these circumstances, the Plaintiff having engaged the Defendant as traveller; what does clause 11 mean? I cannot read it as meaning anything but that for two years after the expiration of the employment the Defendant should not sell beer either wholesale or retail within the ambit of 100 miles of *Cardiff*. My Brother *Stirling* limited it to wholesale. I think it includes both wholesale and retail. Then what is the law applicable to such a case? It has been read by Lord Justice *Lindley*, it has been stated again by Lord Justice *Lopes*, and I am content to take it as laid down by Lord Chief Justice *Tindal* in *Horner* v. *Graves* (1). Reading the agreement in this way, viz., that the traveller was not for two years, within the ambit of 100 miles of *Cardiff*, to sell beer either by wholesale or retail, was the covenant such as only to afford a fair protection to the interests of the master, and not so large as to interfere with the interests of the public? I cannot, for my part, see anything unreasonable in it. I speak with diffidence because I am not so accustomed to these cases as I wish I were; but when a man engages a traveller who is to push his trade in one of several ways in which his trade can be carried on, why is it unreasonable to stipulate "For two years after you leave my service you are not to sell within a certain distance of a certain place so as to compete with me"? Mr. *Buckley* says there is no evidence that selling beer otherwise than through these wholesale purchasing agents would compete with the Plaintiff's business. I cannot agree. It seems to me that in these cases the Court has to decide what is or is not a fair limit of protection in each case and that we must apply our ordinary knowledge of life to the facts proved and ascertain whether there is likely to be competition or not. In my judgment there is ample evidence that there would be competition if the Defendant were allowed to sell beer within the prescribed ambit, and therefore this covenant is not too wide.

I make this remark in conclusion, that I suppose we all agree with Mr. Justice *Stirling* in thinking that the part of the covenant about the aerated waters is severable.

(1) 7 Bing. 735.

LINDLEY, L.J.:—

Yes; I intended to add that.

LOPES, L.J., concurred.

Solicitors for Appellant: *Smiles, Ollard, & Yates*, agents for *Belcher, Cardiff*.

Solicitors for Plaintiff: *Thomas White & Sons*, agents for *Press & Inskip, Bristol*.

H. C. J.

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[1890 H. 3061.]

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ROMER, J.
April 29, 30; *May* 2, 3, 4, 5, 6, 10.
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July 29.

Power of Attorney—Agreement for Sale—Sale of Business under Power of Attorney—Partnership—Specific Performance—Waiver by Purchaser.

A., *B.*, *C.*, and *D.* traded at *E.* under the firm of *A. & Co.* *A.*, who lived abroad, gave a power of attorney to *B.*, by which he authorized him to sell, or concur in selling, any of *A.'s* property by auction, or privately, upon such terms, subject to such conditions, and in such manner as *B.* should think fit. *B.*, *C.*, and *D.* agreed to sell the business as a going concern to *H.*, *B.* signing as attorney for *A.* as well as on his own behalf. *H.* agreed to pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5000 deferred capital; the vendors might require *H.* to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited company, the vendors were to receive shares for their deferred capital; and if the debts were less than £15,000, *H.* was to pay the difference in cash at the end of two years. It was agreed that *H.* might carry on the business under the style of *A. & Co.*, and that the vendors should not carry on any like business within fifty miles of *E.* *H.* brought an action for specific performance:—

Held, by *Romer*, J., that the clause in restraint of trade was not authorized by the power of attorney; that the agreement, therefore, was not binding on *A.*; that this objection was not removed by *H.'s* offer to waive that clause; and that the action must be dismissed:

Held, on appeal, that the stipulations as to deferred capital did not constitute a partnership, but were only a mode of ascertaining the purchase-money, and that the agreement, therefore, could not be held void as against *A.* on the ground that the power of attorney did not authorize an agreement for a partnership:

Held, further, that, assuming the licence to trade under the name of

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A. & Co. and the agreement by the vendors not to trade to be unauthorized by the power of attorney, they were stipulations for the benefit of *H.* which he might waive and, he having waived them, that specific performance ought to be decreed:

Semble, that the agreement by the vendors not to trade was authorized by the power of attorney, inasmuch as a going concern could not be sold to advantage without such a stipulation.

Whether the giving an authority to the purchaser to trade in the name of *A. & Co.* was within the power, *quære.*

FOR some years previous to 1890 the Defendants, *Benjamin Outram, Edmund Outram, Ann Ashworth,* and *Elizabeth Outram,* carried on business in partnership at *Ellistones, Greetland,* in *Yorkshire,* as dyers, finishers, and farmers, under the firm of *Benjamin Outram & Co.*, and were entitled to the real and personal estate employed in the business.

By deed-poll, dated the 22nd of May, 1889, *Benjamin Outram,* therein described as "gentleman," after reciting that he was then residing in the United States of *America,* and was desirous of confiding the entire management of his estate and affairs during his absence from *England* to his brother, the said *Edmund Outram,* "of *Greetland,* dyer," constituted and appointed *Edmund Outram* his true and lawful attorney for him, and in his name to ask, demand, sue, and distrain for, recover, and receive all such rents, profits, goods, debts due, and sums of money and effects as then were, or should or might be, due, owing, payable, or belonging to him, *B. Outram*; with powers, as therein mentioned, to settle accounts, give discharges, and bring actions and suits, and to submit differences to arbitration. "And also for me, and in my name to sell, or concur in selling, any of my real, leasehold, or personal property to any person or persons, company or companies whatsoever, and either by public auction or privately, upon such terms, subject to such special or other conditions, and in such manner as he (the attorney) shall approve, and either for my whole interest therein, or for any less interest, and to buy in at any sale, and to rescind or vary any contract for sale, and to resell, and to allow any purchase-money to remain on credit on or without security"; and to let, or concur in letting, any of his real or leasehold property in manner therein mentioned, and also for him and in his name to mortgage the whole or any part of

his real, leasehold, or personal property; "and also for me, and in my name and as my act and deed, to sign any deeds that in the opinion of my said attorney ought to be executed by me, and generally to do, negotiate, transact, and perfect all and every other act, deed, matter, or thing whatsoever which may be found requisite, not only for the purposes before specified, but also for the transacting, settling, and adjusting all other my estate, affairs, tradings, dealings, and concerns whatever; I, the said *Benjamin Outram*, giving, and hereby granting, unto the said *Edmund Outram* full power and authority in the premises to act as fully and effectually to all intents and purposes as I could or might do, as if I were personally present and did the same myself; and I hereby agree to allow, ratify, and confirm all and whatsoever my said attorney may lawfully do in, or about, or concerning the premises by virtue of these presents."

On the 12th of February, 1890, the firm being in difficulties executed a deed of inspectorship which did not contain any *cessio bonorum*, but bound the partners to carry on their business under the direction of inspectors appointed by the creditors, and, until their debts were paid in full, to deal with their joint and separate property, and the rents, profits, and income, in such manner as the inspectors should direct.

There being danger of the firm becoming bankrupt, negotiations took place with a view to a sale of the business; and, ultimately, the Plaintiff agreed to purchase, on the terms of the following agreement, which proceeded on the basis of the property free from incumbrances being worth £20,000.

By an agreement in writing, sanctioned by the inspectors, dated the 12th of May, 1890, and made between the Defendants, *Benjamin Outram*, *Edmund Outram*, *A. Ashworth*, and *Elizabeth Outram*, "carrying on business in copartnership as dyers and finishers and farmers of *Ellistones*, &c., under the style of *Benjamin Outram & Co.*," as vendors of the one part, and the Plaintiff, as purchaser, of the other part, (the Defendant *Edmund Outram* signing the same as attorney for the Defendant *Benjamin Outram*, as well as on his own behalf), after stating that for the purposes of the said agreement the liabilities secured and unsecured of the vendors in respect of the said businesses and the *Ellistones*

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estate (irrespective of debts secured collaterally on property of the vendors, or some of them, other than the property intended to be sold and capable of being discharged by means of such other property) were taken at from £14,600 to £15,000, the vendors agreed to sell to the purchaser the said *Ellistones* estates and businesses, and all the property of every kind in or about the estate, or relating to the businesses, upon the following terms:—

(1.) "The said *G. W. Hawksley* shall, having regard to the provisions of a certain deed of arrangement entered into by the vendors, and dated the 12th of February, 1890, discharge all the liabilities of the said firm relating to the *Ellistones* estate, or the said businesses, if and so far as they shall not exceed £15,000, including debts secured by mortgage or otherwise; and if the debts and liabilities aforesaid shall not exceed £15,000, the vendors shall be deemed to be entitled to a share of profits to be made by the concern, annually, calculated upon the sum of £5000, so deferred, nevertheless, that they shall receive nothing on account thereof until the other capital in the concern for the time being shall have been credited for the year with £10 per cent., after which, surplus profits shall be applied in the first place in or towards paying £10 per cent. to the vendors on the said sum of £5000, or other the amount for the time being representing their deferred capital therein, and any residue of profits shall be apportioned rateably between all the capital of the concern."

(2.) "If the existing liabilities which the purchaser shall have to discharge shall exceed the sum of £15,000, the balance is to be set off against the said sum of £5000 deferred capital of the vendors, in the proportion (as deduction) of £5 for every two which the purchaser may so have to discharge. If the liabilities which he may have to discharge shall be less than £15,000, he shall, at the expiration of two years from the date hereof pay the difference to the vendors in cash."

(3.) "The purchaser shall be at liberty in carrying on the business to use the style of *Benjamin Outram & Co.*"

(4.) There followed a clause as to *Edmund Outram* acting as manager at a salary, and the agreement then proceeded:—

(5.) "Six months' notice shall be necessary to determine the engagement of the said *Edmund Outram*. The vendors, save in respect of such engagement, shall not be at liberty to carry on directly or indirectly, within the radius of fifty miles of *Ellistones* aforesaid, any business of dyeing or finishing, or any similar business, or be in any way connected therewith."

(6.) "Until the concern be (as is contemplated in the future,) converted into a limited company, the vendors, if they require to convert their deferred capital into cash, may require the purchaser to take over the same, in which case he shall pay them out in cash at the rate of two-fifths of the amount to which under these presents they would for the time being be entitled as deferred capital."

(7.) "If the concern shall be converted into a limited company, the vendors shall receive shares for the amount of their capital for the time being deferred in manner hereinbefore set forth with respect to their deferred capital."

(8.) "The amount of their deferred capital shall meanwhile, if required by the vendors, be secured by the bond of the purchaser."

(9.) "All deeds and documents necessary to carry the terms of this agreement into effect shall be prepared by Messrs. *Humphreys & Hirst*, solicitors of *Halifax*, the costs thereof to be borne by the purchaser. If any dispute arise on the construction of this agreement, the same shall be referred to *G. B. Humphreys*, solicitor."

Shortly after the signature of the agreement, the Plaintiff took possession of the property comprised therein, except a dwelling-house and grounds, of which the three Defendants who were in *England* retained possession, and he carried on the business on his own account under the firm of *B. Outram & Co.* He paid on account of his purchase-money debts of the firm to the amount, as was stated, of about £8000; but there were mortgages to the amount of about £9000 on the purchased property which had not been paid off.

The Plaintiff in August, 1890, had deeds prepared for carrying out the agreement; but the Defendants refused to execute them or to carry out the agreement, insisting that they were not

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bound by it. The Plaintiff thereupon in the same month commenced this action to compel specific performance of the agreement.

The Defendants by their statement of defence pleaded that the power of attorney did not authorize the Defendant *Edmund Outram* to enter into or sign on behalf of the Defendant *Benjamin Outram* such an agreement as that of the 12th of May, 1890; and they submitted that the agreement was not an agreement of which the Court would decree specific performance. They also alleged that the purchase-money stated in the agreement was considerably less than the value of the property agreed to be sold, and that the agreement was in effect obtained from them by pressure and intimidation; and by way of counter-claim the Defendants offered, on the agreement being rescinded, to repay the Plaintiff the moneys he had expended, and they claimed rescission of the agreement.

The action came on for trial before Mr. Justice *Romer* on the 29th of April, 1892.

At the trial evidence was gone into at length as to the value of the properties and the circumstances under which the agreement was signed, the result of which is sufficiently noticed in the arguments and in the judgment of Mr. Justice *Romer*.

Neville, Q.C., and *Warrington*, for the Plaintiff:—

The power of attorney authorized *Edmund Outram* to enter into the agreement of the 12th of May, 1890. It was an absolute sale to the Plaintiff, a portion of the purchase-money being left in on certain conditions. There has been part performance. The debts and liabilities have proved to be £17,000, and the Plaintiff has entered into possession and carried on the business and paid debts up to £8000, and is entitled to specific performance on paying the remaining £9000.

B. Eyre, and *Pattullo*, for the Defendants:—

The power of attorney did not authorize *Edmund Outram* entering into an agreement involving risk to *Benjamin Outram*. The right conferred on the Plaintiff to carry on the business in the name of *Benjamin Outram & Co.* might have rendered *Ben-*

jamin Outram liable to creditors. The stipulation that Mr. *Benjamin Outram* shall not carry on a similar trade within fifty miles of *Ellistones* is also objectionable. Both these clauses are outside the scope of the power of attorney: *Harper* v. *Godsell* (1). The agreement, therefore, cannot be enforced against *Benjamin Outram*. *Edmund Outram* may be liable in damages for having represented that he had authority to sign the agreement as attorney for *Benjamin Outram*; but no such relief is claimed in this action. Then as to the agreement itself, specific performance will not be decreed where there is uncertainty as to the construction to be put on the agreement: *Marshall* v. *Berridge* (2); *Pearce* v. *Watts* (3). This agreement is of a peculiar nature, and it is very uncertain what its true effect may be. It is really an agreement for a partnership: *Ex parte Taylor* (4); *Pooley* v. *Driver* (5); *Mollwo, March & Co.* v. *Court of Wards* (6); *Lindley* on Partnership (7).

Neville, in reply:—

The Plaintiff never intended a partnership, and there is no real difficulty about the meaning of the agreement. There has been part performance to a considerable extent, and the Court will do its utmost to carry out the agreement: *Hart* v. *Hart* (8). The true test of partnership is whether the relation of principal and agent exists—not whether there is participation in profits: *Cox* v. *Hickman* (9); *Badeley* v. *Consolidated Bank* (10); *Lindley* on Partnership (11). The power of attorney is sufficient to authorize such an agreement as this. It authorizes either a carrying on of the business or a sale. The business could not be carried on without liability, and could not be sold as a going concern unless power were given to continue the use of the firm's name, and any liability would be put an end to by the usual notices. The clause in restraint of trade is not uncommon in these cases, and does not go further than is necessary for the

(1) Law Rep. 5 Q. B. 422.
(2) 19 Ch. D. 233.
(3) Law Rep. 20 Eq. 492.
(4) 12 Ch. D. 366.
(5) 5 Ch. D. 458.
(6) Law Rep. 4 P. C. 419.
(7) 5th Ed. p. 17.
(8) 18 Ch. D. 670, 685.
(9) 8 H. L. C. 268.
(10) 38 Ch. D. 238.
(11) 5th Ed. p. 33.

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reasonable protection of the purchaser. But the Plaintiff is willing to waive these two clauses as against *Benjamin Outram*. If the power of attorney is insufficient, the Plaintiff is entitled to specific performance in respect of the shares of the other three Defendants, with an abatement in the purchase-money and to an inquiry as to what those shares are: *Hooper* v. *Smart* (1), without prejudice to any action for damages that he may be advised to bring against *Edmund Outram* in relation to the power of attorney. At any rate, the Plaintiff is entitled to a lien on the properties for the moneys he has expended in carrying on the business.

1892. May 10. ROMER, J.:—

One of the first questions arising in this case is whether *Benjamin Outram* is bound by the agreement of the 12th of May, 1890. This depends entirely upon whether the power of attorney given by him to *Edmund Outram* authorized *Edmund Outram* to enter into such an agreement on *Benjamin Outram's* behalf. That power authorized the attorney to sell any property of *Benjamin Outram* or any interest therein, which would include *Benjamin Outram's* interest in the partnership business; but did it authorize *Edmund Outram* to enter into such a peculiar agreement as this? I think not, and in particular I need only refer to one clause, viz., "The vendors shall not be at liberty to carry on directly or indirectly within the radius of fifty miles of *Ellistones* aforesaid any business of dyeing or finishing or any similar business or be in any way connected therewith." It appears to me that is wholly unauthorized by the power, and I need not consider whether the power authorized the clause conferring on the purchaser the right to carry on the business in the style of *Benjamin Outram & Co.*, or the difficult question whether the agreement did not constitute a partnership between the vendors and the purchaser, and was in this respect also beyond the authority conferred by the power. It follows that in my judgment the agreement is not binding on *Benjamin Outram*, and the action against him must be dismissed. Mr. *Neville*, in his reply for the Plaintiff, offered to waive, as against

(1) Law Rep. 18 Eq. 686.

Benjamin Outram, the benefit of the two provisions in the agreement I have specially referred to; but this offer will not make the agreement binding on *Benjamin Outram* if it was not previously binding. The agreement cannot in this way be made binding or not binding on *Benjamin Outram* at the option of the purchaser. But seeing that *Benjamin Outram* has joined in certain personal charges of misconduct against the Plaintiff, which in my judgment have not been established, I dismiss the action as against him without costs.

The Plaintiff then asks for specific performance as against the other three Defendants in respect of their interests in the properties sold. But I do not see how the Court can do this as matters stand, even if in other respects the agreement was one which the Court would specifically enforce as against these Defendants, which I need not determine. What the interests of these three Defendants in the properties are does not appear. An inquiry is asked for as to this; but, seeing that some parts at least of the properties are capital in the partnership business, such an inquiry would involve taking the accounts of the partnership, and how the consideration payable by the purchaser could be apportioned I do not know. Moreover, far as the cases have gone which decide that a purchaser is in certain cases entitled to take with an abatement of purchase-money such interests as his vendor has, when the vendor cannot give the full properties contracted to be sold, these cases have never gone to the extent now asked for, and I do not see my way to such an extension of the jurisdiction. It follows that this action for specific performance as against these three Defendants must be dismissed, but under the circumstances I dismiss it without costs.

The Plaintiff is anxious to be at liberty to try in another action his claims as against these three Defendants for damages for breach of contract and as against *Edmund Outram* for representing that he had authority to sign the agreement on *Benjamin Outram's* behalf, which damages admittedly could not be decided in this action as now constituted, or on the materials and evidence now before me, and, therefore, in dismissing the action as against these three Defendants, I do so without prejudice to these claims.

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Towards the end of his reply, Mr. *Neville* suggested and asked me to make a declaration to the effect that the purchaser has a lien for the sums he has paid under the agreement upon the interests in the properties sold of these three Defendants; but it appears to me that I cannot properly now investigate or decide whether the Plaintiff has such a right or make any such declaration.

With regard to the counter-claim of the Defendants for rescission of the agreement, I think this is a case where the Court will not, under the circumstances, in the exercise of its equitable jurisdiction, actively assist the Defendants by rescinding the agreement, even though, having regard to some of the facts of the case, the Defendants might have been entitled to successfully resist the action for specific performance against them. I therefore dismiss the counter-claim, and I dismiss it with costs, having regard to certain of the charges against the Plaintiff made by the Defendants which they failed to establish, and to their conduct after the agreement was signed.

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The Plaintiff appealed. The appeal was heard on the 29th of July, 1892.

Neville, Q.C., and *Warrington*, for the appeal:—

The power of attorney clearly gave *Edmund Outram* authority to concur in a sale of the partnership business and property, and if the sale is not completed gross injustice will have been done to the Plaintiff, who has paid £8000, which he never can get back again. We submit that the stipulations as to the use of the name of the firm and the restraint upon trading within a limited distance are within the power, since a goodwill can hardly be sold without such stipulations, and they must be treated as incident to the power to sell a business. We, however, offered below, and we still offer, to waive as against *B. Outram* these stipulations on the ground of which Mr. Justice *Romer* decided against us. We submit that we were entitled to waive them as being merely stipulations for the purchaser's advantage, and if they are waived the agreement must be read as if they were not there. No partnership was created by the agreement.

[LINDLEY, L.J.:—You need not address yourself to that unless we call upon you after hearing the other side.]

B. Eyre, and *Pattullo*, for the Defendants:—

This agreement is not one which the Court will enforce. The power of attorney did not authorize an agreement for partnership, and this agreement creates a partnership: *Pooley* v. *Driver* (1). We have here what in *Badeley* v. *Consolidated Bank* (2) Lord Justice *Cotton* refers to (3)—an indication that the capital was the capital of the parties jointly.

[A. L. SMITH, L.J.:—I can see nothing but a way of paying the vendor in a certain way in certain events.

LINDLEY, L.J.:—I see nothing in the nature of a partnership here.]

Then the profits in certain events are to be apportioned "between all the capital of the concern," but the Plaintiff can bring in capital as he pleases; so how can it be ascertained how the profits are to be divided? The agreement is too vague and uncertain for the Court to enforce.

Then, again, we say that *Benjamin Outram's* power of attorney did not authorize the sale of his share in the partnership business at all. *B. Outram* describes himself as "gentleman," his brother as "dyer." This raises a presumption that he was not intending to deal with trade property, and the instrument throughout appears to be framed on the intention to deal only with property other than trade property, the partnership business being nowhere alluded to.

[LINDLEY, L.J.:—There are words wide enough to include all his property.]

A power of attorney is construed strictly, and mere general words will not extend its scope—they are merely inserted for carrying out the particular purposes expressed: *Harper* v. *Godsell* (4). The generality of the operative part of a power of attorney is readily controlled by the expression in the recitals

(1) 5 Ch. D. 458.
(2) 38 Ch. D. 238.
(3) 38 Ch. D. 253.
(4) Law Rep. 5 Q. B. 422.

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of the object for which it is granted: *Danby* v. *Coutts & Co.* (1); *Attwood* v. *Munnings* (2). But if the power of attorney does give authority to concur in selling the business, it could not, we submit, authorize an agreement of this kind, expressed in terms which are fairly contended to make a partnership, and which, in one event, contemplate making the vendors shareholders in a joint stock company. The agreement imposes on the vendors a personal liability not to carry on a like business within certain limits, and authorizes the purchaser to use the name of the old firm, which might impose liabilities on the old members of the firm. The power of attorney cannot be construed to authorize such terms.

LINDLEY, L.J.:—

This is an appeal against a judgment of Mr. Justice *Romer*, dismissing, without costs, an action brought by a purchaser against the vendors for specific performance of the agreement of sale. The grounds upon which Mr. Justice *Romer* dismissed the action were these. The vendors are four persons, one of whom is abroad, and had executed a power of attorney, and Mr. Justice *Romer* thought that the agreement of which specific performance is sought went beyond the authority given to the attorney. The learned Judge did not apparently apply his mind to the question whether the agreement could be severed—that is to say, whether if some of the clauses were within the authority, and some beyond it, those beyond could not be rejected.

The agreement is not well drawn, and is not very clear; but one thing I think is plain enough, that it is an agreement for purchase and sale. The vendors, the parties of the first part, were carrying on business in partnership in *Yorkshire* as dyers and finishers, and they are described as the "vendors of the one part." They are the Defendants. One of them, named *Benjamin Outram*, was abroad in *America*, and entered into the agreement by his attorney, his brother *Edmund Outram*. The party of the second part is the purchaser, Mr. *Hawksley*, who is the Plaintiff in this action. Before reading the agreement, I may state that the general position of affairs was this, that the vendors were in

(1) 29 Ch. D. 500. (2) 7 B. & C. 278.

difficulties, they were being pressed by their creditors, and we were told that there were several executions against them. Under these circumstances they entered into this agreement for the sale of their property and business to Mr. *Hawksley*. The purchase-money is ascertained in this way: the debts are estimated at about £15,000; the property sold was valued at £20,000. That is not so stated, but is to be gathered from the provisions in the deed. The purchaser was to pay the debts, and if it turned out that they did not exceed £15,000 the vendors were to be credited with £5000, which they were to receive from the purchaser, but not immediately—it was to be retained for a time as "deferred capital," and the vendors were to have in the meantime some share of the profits in respect of it. If the debts turned out more than £15,000 a deduction was to be made from the £5000, and if they turned out to be less than £15,000 the difference was to be paid by the purchaser to the vendors at a stated time.

It has been contended that this is an agreement for a partnership; but it is nothing of the sort. It is evidently nothing more nor less than an agreement for the sale of the property and the business as a going concern for a sum of money, a portion of which is undetermined and has to be ascertained, and which portion until paid is to carry a certain share of the profits. No partnership was dreamed of. The recital is this: "Whereas, for the purposes of this agreement, the liabilities secured and unsecured of the vendors in respect of the businesses aforesaid and the *Ellistones* estate (irrespective of debts secured collaterally on property of the vendors, or some of them, other than the property intended to be hereby sold, and capable of being discharged by means of such other property) are taken at from £14,600 to £15,000." Then it is agreed that "the vendors shall sell, and the purchasers shall purchase, all the property known as the *Ellistones* estate," and the hereditaments and premises connected with it, and the business as a going concern, upon the terms therein mentioned. It then proceeds: "The terms of the purchase are to be as follows: The said *G. W. Hawksley* shall (having regard to the provisions of a certain deed of arrangement entered into by the vendors, and dated 12th Feb. 1890)"

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—that is the creditors' deed executed by the vendors, who, as I said, were in difficulties—"discharge all the liabilities of the said firm relating to the *Ellistones* estate or the said businesses, if and so far as they shall not exceed £15,000, including debts secured by mortgage or otherwise." The creditors' deed arranged that these debts should be paid by instalments, which explains the reference I have read to the provisions of a certain deed of arrangement. Thus, the first part of the purchase-money was to be employed in paying those debts not exceeding £15,000, which were to be paid according to the provisions of that deed. Then comes this: "If the debts and liabilities aforesaid shall not exceed £15,000 the vendors shall be deemed to be entitled to a share of profits to be made by the concern annually, calculated upon the sum of £5000 so deferred" (the expression "so deferred" does not appear before; but I have endeavoured to explain what is meant by that £5000), "nevertheless that they shall receive nothing on account thereof until the other capital in the concern for the time being shall have been credited for the year with £10 per cent., after which surplus profits shall be applied in the first place in or towards paying £10 per cent. to the vendors on the said sum of £5000, or other the amount for the time being representing their deferred capital therein, and any residue of profits shall be apportioned rateably between all the capital of the concern. If the existing liabilities which the purchaser shall have to discharge shall exceed the sum of £15,000 the balance is to be set off against the said sum of £5000 deferred capital of the vendors in the proportion (as deduction) of £5 for every two which the purchaser may so have to discharge. If the liabilities which he may have to discharge shall be less than £15,000, he shall at the expiration of two years from the date hereof pay the difference to the vendors in cash." That is not a very clear set of provisions; but it is the machinery provided for the purpose of ascertaining the amount of purchase-money (if any) payable to the vendors after the purchaser had paid the debts which were estimated at £15,000. That is all it comes to. It is not very easy to work out; but to suppose that it means a partnership is to suppose what obviously was never thought of by the partners. They never dreamed of such a

thing, nor have the stipulations that effect. Then we go on: "The purchaser shall be at liberty in carrying on the business to use the style of *Benjamin Outram & Co.*"—that is the style under which the vendors had hitherto carried on the business. Then followed provisions as to *Edmund Outram*, one of the vendors, acting as manager of the business at a salary. Difficulties with him arose, and he was dismissed, and hence this litigation. Everything went smooth till then. Since then nothing has gone straight. The agreement proceeds: "six months' notice shall be necessary to determine the engagement of the said *Edmund Outram*. The vendors, save in respect of such engagement, shall not be at liberty to carry on directly or indirectly, within the radius of fifty miles of *Ellistones* aforesaid, any business of dyeing or finishing, or any similar business, or be in any way connected therewith." That is the clause which Mr. Justice *Romer* thought was in excess of the authority conferred by the power of attorney. Of course, as regards the other partners, there was no excess of authority. It is only as to the one particular partner that it is said there was no authority to enter into that stipulation. [His Lordship then read the stipulations (6.), (7.), (8.), and (9.).]

Now, what happened was this. The purchaser entered into possession of the property, and he has paid off a considerable amount of the debts. Mr. *Neville* alleges that he has paid off £8000, and that there is a mortgage of £9000 still on the property, the interest of which he has kept down. If those statements are correct, nothing ever will become due to the vendors in respect of the deferred capital. Mr. *Eyre* is not satisfied with their correctness, and he thinks that something may be got by the vendors under an inquiry, the nature of which I will refer to presently.

Now, how does the case stand between the Plaintiff and the Defendants? The purchaser says to the vendors, "Convey me the property." The vendors say, "We will not," and up to a certain point they are right, for they are not bound to convey the property until the debts are paid, including the mortgage debts on the property. They are not bound to convey the equity of redemption and to rely on a covenant of indemnity

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against the mortgagees, and if that were all I should think they were right. But that is not all. In consequence of this controversy which has unfortunately arisen, they refuse to carry out the agreement on any terms, and we have to decide whether they are justified in this refusal.

First of all, they contend that this is an agreement of so obscure and uncertain a character, that the Court cannot or ought not to decree specific performance of it, and Mr. *Eyre* has argued with considerable skill and ingenuity that there is more obscurity about it than I think there is. He has argued that it is a partnership. I am quite convinced, on the true construction of this agreement, that a partnership is the very last thing of which the parties thought. It is simply a method—a complicated method, I agree—of ascertaining what is due to the vendors. There is no difficulty in ascertaining upon inquiry what, if anything, was the amount of debts beyond £15,000. Then it is said that *Benjamin Outram*, one of the vendors, is not bound by the agreement by reason of its going beyond the authority which he had conferred on the person who signed it as his attorney. *Benjamin Outram* was in *America*, and about a year before this agreement he executed a power of attorney, to which I will call attention. He therein describes himself as "of *Greetland*, in the parish of *Halifax*, in the county of *York*, gentleman, and of *Eastern Maryland*, in the United States of *America*, where I am now residing." Then there is a recital: "Whereas I am now residing in the United States of *America*, and am desirous of confiding the entire management of my estate and affairs during my absence from *England* to my brother, *Edmund Outram*, of *Greetland* aforesaid, dyer." He then appoints his brother *Edmund* his attorney, to recover and receive all such rents, profits, goods, debts, sum and sums of money and effects, as then were, or should or might be due and owing and payable to him, with power to adjust accounts, give receipts, bring actions, and submit differences to arbitration. "And also for me and in my name to sell or concur in selling any of my real, leasehold, or personal property to any person or persons, company or companies whatsoever; and either by public auction or privately, upon such terms, subject to such special or other conditions, and in such

manner as he the attorney shall approve, and either for my whole interest therein or for any less interest, and to buy in," and so on. Now, pausing there for a moment, Mr. *Eyre* contends that that does not include a power to concur with his copartners in selling the business in which they were all concerned. I cannot so restrict that power to sell. *Benjamin Outram* in substance empowers his brother to sell, or concur in selling, in his discretion, anything he has got in this country; and I see no reason whatever for cutting that down and confining it to property other than partnership property. Then, after some further enabling words, he proceeds: "And also for me, and in my name and as my act and deed, to sign any deeds that, in the opinion of my said attorney, ought to be executed by me, and generally to do, negotiate, transact, and perfect all and every other act, deed, matter, or thing whatsoever which may be found requisite"—then come some very important words—"not only for the purposes before specified" (which would introduce, of course, the objects mentioned in the recitals), "but also for the transacting, settling, and adjusting all other my estate, affairs, tradings, dealings, and concerns whatsoever; I, the said *Benjamin Outram*, giving and hereby granting unto the said *Edmund Outram* full power and authority in the premises to act as fully and effectually to all intents and purposes as I could or might do as if I were personally present and did the same myself."

I cannot conceive a wider power than that; and, looking at this as a power of attorney given by one partner to another to sell, or concur in selling, his property in any way the attorney thinks best, I am not at all prepared to say that that would not include a power to sell the goodwill of the business to the best advantage in a business way; and we know, as a matter of business, that in order to get a good price for the goodwill of a business it is necessary that the vendor shall undertake not to compete with the purchaser in the same business. I am, therefore, disposed to think that under such a power as this a stipulation not to compete with the purchaser might be entered into, though I think the point is a little doubtful. The purchaser, however, says: "A doubt being raised whether the power of attorney authorizes the giving a purchaser power to carry on the

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business in the name of the old firm, which might expose the old partners to liability, or authorizes the binding the vendors not to carry on the same business, I will waive those stipulations." That appears to me to remove all difficulty, because it is quite obvious that those two clauses are inserted simply and purely for the benefit of the purchaser; and if there is any doubt whether they are binding upon the vendors, and the purchaser waives them, what have the vendors to complain of? What conceivable difficulty remains if that is done? I can see none. Of course, if those clauses were so inextricably mixed up with other parts of the transaction that they could not be severed, there might be a difficulty; but they are not. They are perfectly severable. The attorney has got power to sell the business, and says: "I agree to sell the business." He also says: "I agree further that the vendors shall not carry on business in competition with you within a radius of fifty miles." The validity of that further agreement is doubtful. The purchaser says: "If that is doubtful, I give it up." Where is the difficulty in enforcing specific performance of the other stipulation which is not tainted with any doubt or affected by any difficulty? It appears to me that the Plaintiff is right. It is obvious that we should be doing grievous injustice if we were to decide in any other way, because the Plaintiff has, on the faith of this agreement, entered into possession and paid considerable sums of money. If he cannot get specific performance he will never get his money back, and it appears to me that there is neither principle nor authority which can or ought to prevent us from making a decree in his favour. Our judgment will be to the following effect: "Decree specific performance of the agreement, and the Plaintiff waiving his right to carry on the business in the name of *Benjamin Outram & Co.* and his right to prevent the Defendants from carrying on business within fifty miles of *Ellistones*, direct an inquiry whether anything, and what, is payable by the Plaintiff to the Defendants under the agreement, and whether any and which of the debts which the Plaintiff agreed to pay are still unpaid; and upon payment of what, if anything, shall be so found due, and of such debts, if any, including mortgage debts, as shall be certified to be still unpaid, order the

Defendants to convey the property agreed to be sold to the Plaintiff, such conveyance to be settled by the Judge if the parties differ." It appears to me that the Defendants being wrong, they ought to pay the costs of the action up to the hearing.

LOPES, L.J.:—

In this case, after the very exhaustive judgment which has just been delivered, I should think it unnecessary to add anything if we were not differing from the decision of the learned Judge below, and I have very little to add.

This is an action for specific performance of an agreement dated the 12th of May, 1890, and the main ground upon which specific performance is resisted is this: it is said that the agreement, so far as *Benjamin Outram* was concerned, goes beyond the authority conferred by him upon his brother as attorney.

It was said in the first place that it went beyond the authority so conferred because it was an agreement for a partnership. Now, if it were an agreement for a partnership, I presume there can be no doubt that it would have gone beyond the authority given to the attorney. But is it an agreement for a partnership? To my mind, clearly it is not. It is an agreement for a purchase and sale. The true test of whether a partnership was intended is this, whether there was a joint business, or, whether the parties were intending to carry on the business as the agents of each other. That is a true test whether a partnership was contemplated or not. Now, looking at this agreement, I say it is perfectly clear nothing of that kind was contemplated. It seems to me that what was contemplated was an agreement for purchase and sale and nothing else, and if (which is not the case) there were nothing else in the agreement to lead to that conclusion, I should be driven to it by the two provisions, first, that the vendors are not to carry on business within fifty miles of *Ellistones*, and, secondly, that the purchaser is to be permitted to use the name of the firm. Those two provisions are absolutely and entirely inconsistent with a partnership, and they satisfy me that nothing in the nature of a partnership was ever contemplated or intended.

Then it is said that the agreement is so equivocal that specific

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performance of it ought not to be granted. I am unable, again, to adopt this view. I agree that the mode in which the money was to be paid is somewhat complicated; but I see nothing difficult or ambiguous in it, and I think it is not at all difficult to understand what was the intention of the parties with regard to the mode of payment.

Then it is said, even assuming this to be an agreement for purchase and sale, that the power of attorney given to *Edmund* by *Benjamin* gave no authority to enter into such an agreement. Now, I do not propose again to read those passages in the power of attorney which have been referred to by my Brother *Lindley*. They appear to me to be amply sufficient to give the power to sell this property, and Mr. *Neville* has relinquished the two provisions as to the vendors not carrying on the business within fifty miles and as to the purchaser being at liberty to carry on the business in the name of the old firm. If it had been necessary to decide the point, I should have been inclined to think that the power of attorney authorized the insertion of provisions of that kind. It must be borne in mind that this was a power of attorney given by one partner to another, and it was a power of attorney which clearly authorized a sale of this partnership property. If that is correct, then, having regard to the very large words contained in the power of attorney, it would be a very strong thing to say that it was not the intention of the donor of the power to give to the attorney power to do everything which was incidental to the proper sale of that property and to the obtaining a good price for it; and it cannot be denied that the insertion of these two provisions would go far to improve and enhance the price that would be obtained for the property However, Mr. *Neville* has thought fit, and I have no doubt in the exercise of a sound discretion, to relinquish his rights with regard to the insertion of those two provisions. Now, it is perfectly clear that they are provisions intended solely for the benefit of the purchaser; the purchaser, therefore, is at liberty to relinquish them, and, if he does so, it is immaterial whether he could have successfully insisted on them.

With regard to the power of attorney, I merely add that I am fully aware of the authorities in which it has been held that

general words inserted in a power of attorney are to be construed with reference to the objects which the persons giving the power have in view, and I think that the interpretation which we put upon this power of attorney does not in any way militate with those authorities.

The conclusion to which I have arrived is that there should be a decree in the terms which Lord Justice *Lindley* expressed at the end of his judgment.

A. L. SMITH, L.J.:—

This is an action brought by the Plaintiff against four persons, *Benjamin Outram*, *Edmund Outram*, *Ann Ashworth*, and *Elizabeth Outram*. He brings his action for a decree for specific performance of a contract entered into, as the Plaintiff alleges, by them, on the 12th of May, 1890.

The Defendants counter-claimed that the contract was not binding upon them, and desired to have it set aside upon various grounds, such as that the price was inadequate, that they had no independent advice, and that there had been pressure and intimidation. Those two cases came on for trial before my Brother *Romer*, and lasted a considerable period of time. My Brother *Romer* gave judgment for the Plaintiff on the counter-claim and dismissed it with costs. When he came to deal with the Plaintiff's action, he arrived at the conclusion that he could not, according to the doctrines prevailing in Courts of Equity, decree specific performance, and he relegated the Plaintiff to the cold comfort of an action at law against persons who had not a penny in their pockets, and dismissed his action without costs and without prejudice to any action for damages. Against that decree the Plaintiff appeals.

Now, the first question is, What is the meaning of this contract of the 12th of May, 1890? It has been strenuously urged by Mr. *Eyre*, that it constituted a partnership between the Plaintiff and the Defendants, and he says that that was not authorized by the power of attorney, nor was it a contract of which specific performance could be decreed.

I am clearly of opinion that this agreement never was intended to create a partnership, and that, upon a true reading of it, it

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cannot be treated as constituting a partnership between *Hawksley* and the Defendants. The position of matters which led up to this contract is clear. The *Outrams*, who were dyers and finishers in *Yorkshire*, had got into difficulties. Several executions were out against them, and they had entered into an arrangement with their creditors. The question was, what in these circumstances were the *Outrams* to do, and, as I read this contract, it is, that they found a purchaser, in the present Plaintiff, to take their liabilities off their backs. That is the meaning of this agreement. The Plaintiff was to purchase, the Defendants were to sell. Now comes the question, what consideration was to be paid by the Plaintiff for that purchase; and, as I read the agreement, the amount was to be ascertained as follows. The debts of the *Outrams* being thought to be somewhere about £15,000, it was arranged that if the debts (all of which, as I read the contract, the Plaintiff took on himself) did not exceed £15,000, the Defendants were to be credited with £5000, which was called "deferred capital," and carried a share of surplus profit until the business was converted into a limited company, or the Defendants chose to convert their deferred capital into cash. If the debts amounted to less than £15,000, the Plaintiff was to pay the difference in cash at the end of two years. If the amount of debts exceeded £15,000, then for every £2 of the excess £5 was to be deducted from the £5000 deferred capital. So that if the debts amounted to £17,000, the Defendants were to get nothing whatever for their business. That is what I understand to be the meaning of paragraphs 1, 2, and 6 of the agreement, and these paragraphs when they are carefully looked at are seen to be simply a mode of ascertaining what, if anything, was to be paid to the Defendants for the business they transferred to the Plaintiff, who undertook to take all their liabilities off the Defendants' shoulders and place them upon himself. It is misconstruing this agreement to say that it can be read so as to shew it to have been in the contemplation of the parties that the *Outrams* and the Plaintiff were to carry on this business in partnership. In my judgment this point fails the Defendants. As to the objections relating to the power of attorney, I have little to say. This power is as large a power of attorney as

could well be drawn, and it has no recital at the beginning which cuts down the general words at the end, as in *Harper* v. *Godsell* (1), and in the case of *Danby* v. *Coutts & Co.* (2) referred to by Mr. *Eyre*. In my opinion, on the true construction of this power of attorney, *Benjamin Outram* gave *Edmund* full power to sell and concur in selling the business in the manner in which he thought it best in the interests of all to sell it. In these circumstances *Edmund Outram* entered into this contract which contains two special clauses, one of which is, that the *Outrams* will not carry on business within fifty miles of *Ellistones*. I agree entirely with what Lord Justice *Lindley* has said as to that clause, that it is not necessary to decide the question, because that clause is given up; though I should think that the power of attorney authorized that clause. As regards the other clause, viz., that the Plaintiff *Hawksley* should be at liberty to use the name of "*Benjamin Outram & Co.*," I am by no means satisfied that the power of attorney authorized it, and I think that it did not. My reason is, that if *Hawksley* was allowed to go on trading under the name of the *Outrams*, the *Outrams* might have an action brought against them, and might possibly be held liable on the ground of their holding out and representing to the public that they were the traders, when in fact *Hawksley* was the trader. A case like that might be made, and I think it may be said that the power of attorney only authorized the brother to sell, and thus to get rid of the property, and did not authorize him to sell and yet leave a possible liability attaching to *Benjamin*. I am glad that this Court has authority to grant specific performance of this agreement, because if specific performance were not decreed the Plaintiff would never be able to recover from the Defendants the large sums which he has already paid under the agreement.

Neville:—The Plaintiff's waiver of the right to use the name of *Benjamin Outram & Co.* of course applies to all the Defendants; but the Plaintiff does not waive as against any of the Defendants except *Benjamin Outram* the stipulation not to carry on trade within fifty miles.

(1) Law Rep. 5 Q. B. 422. (2) 29 Ch. D. 500.

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LINDLEY, L.J.:—The waiver of that stipulation will be expressed as applying only to *Benjamin Outram.*

LOPES and A. L. SMITH, L.JJ., concurred.

Solicitors for Plaintiff: *Walker & Whitfield,* agents for *Humphreys & Hirst, Halifax.*

Solicitors for Defendants: *Jaques & Co.,* agents for *J. Dodson, Stainland.*

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Settled Lands—Tenant by the Curtesy—Tenant for Life—Building Lease—Deed operating as Exercise of Statutory Power—Trustees of Settlement—Absence of Notice—Dealing in Good Faith—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 20, 45, 53, 58, *sub-s.* 1 (*viii.*)—*Settled Land Act,* 1884 (47 & 48 *Vict. c.* 18), *s.* 8.

In October, 1884, one *H.,* purporting to demise as absolute owner (which he believed himself to be), granted a building lease of certain land to the Plaintiff for the term of ninety-nine years.

The Plaintiff made no inquiry as to *H.'s* title, but assumed that he was the absolute owner of the land demised.

The Defendant afterwards agreed to purchase the lease of the demised land from the Plaintiff; but, on investigating the title, he discovered that the land had, under a will, belonged to *H.'s* deceased wife, and that *H.* was only tenant by the curtesy.

A tenant by the curtesy has, under sect. 58, sub-sect. 1 (viii.), of the *Settled Land Act,* 1882, all the powers of a tenant for life; but the lease, though complying with the enabling sections of the *Settled Land Acts,* contained no reference thereto; and at its date there were no trustees of the will, to whom the notices, required by sect. 45 of the *Settled Land Act,* 1882, in the case of a lease by a tenant for life, could be given.

The Defendant then refused to complete, upon the ground that the lease was invalid, or, if not, that the Plaintiff's title was so questionable that it ought not to be forced upon a purchaser.

In an action by the Plaintiff for specific performance of the agreement:—

Held, by the Court of Appeal (*Lindley, Bowen,* and *Kay,* L.JJ.), affirming the judgment of *Kekewich,* J., (1.) that the lease could, and did, operate under the *Settled Land Act,* 1882, to convey the land within the meaning of sect. 20, sub-sect. 2; and (2.) that, as to the absence of trustees of the settlement and the want of the notices required by sect. 45, the Plaintiff, having dealt with the lessor in good faith, was protected by sect. 45,

sub-sect. 3. And held, accordingly, that the lease was a valid lease, although there were no trustees, and that the Plaintiff was entitled to specific performance of the agreement.

The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bonâ fide* with tenants for life when exercising their powers under the *Settled Land Acts*.

By an indenture dated the 31st of October, 1884, and made between *William George Hoskins*, a baker at *Exeter*, of the one part, and the Plaintiff *Edward Mogridge*, a solicitor, of the other part, a plot of ground near *Moretonhampstead* was demised (excepting the minerals) by *W. G. Hoskins* to the Plaintiff *Mogridge*, for a term of ninety-nine years from the 29th of September, 1879, at the yearly rent of £4, the Plaintiff *Mogridge* thereby covenanting to erect and finish a building on the land of not less than £500 in value, and entering into other covenants usual in a building lease.

The lease contained no recitals, and purported on the face of it to be granted by *Hoskins* as owner in fee, all the covenants by *Mogridge* being entered into with *Hoskins*, "his heirs and assigns."

At the date of the lease *Hoskins* was, in fact, tenant by the curtesy, and not owner in fee, of the demised premises, the property having belonged to his wife in fee under a will; but the Plaintiff was not aware of that fact until long afterwards.

The Plaintiff built on the plot a house called "*Fairlawn*," and in June, 1890, he agreed to sell the house and premises for £1000 to the Defendant *Tucker Clapp* for the residue of the term. The Defendant, however, refused to complete the contract, alleging that the Plaintiff was unable to make a good title to the premises; that the lease was not in accordance with the provisions of the *Settled Land Act*, 1882; and that when it was granted there were no trustees for the purposes of the Act, and therefore no notice had been given as required by the Act. The Plaintiff then brought this action, claiming specific performance and damages.

There were several questions raised in the action; but the main and substantial questions were whether, as *Hoskins* was tenant by the curtesy, and therefore had, under sect. 58, sub-sect.

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1 (viii.) of the *Settled Land Act*, 1882, "the powers of a tenant for life under that Act," the lease could operate as a lease under the Act; and, even if it could, whether, under the circumstances, the title was not too doubtful to be forced upon a purchaser.

The action came on for trial before Mr. Justice *Kekewich* on the 9th of March, 1892.

The Plaintiff and *Hoskins*, the lessor, were both examined and cross-examined at the trial. From the evidence so given, it appeared that at the time of the preparation of the lease the title-deeds of the demised premises were in the possession of *Hoskins*, the lessor, who believed himself to be the absolute owner; that he had no legal advice or assistance in the transaction beyond that of a friend of his, a solicitor's clerk, and that the lease was prepared by the Plaintiff *Mogridge* himself, who, though a solicitor, was acting on his own behalf only. The Plaintiff swore positively that he did not, before taking the lease, make any inquiry into the lessor's title, believing that he, the lessor, was able to grant a good and valid lease, and being entirely ignorant of any supposed defect in the title; that he, the Plaintiff, acted throughout the transaction in perfect good faith, and subsequently, on the faith of the lease being valid, expended upwards of £1200 in building on the land.

Warmington, Q.C., and *Upjohn*, for the Plaintiff:—

As "tenant by the curtesy," the Plaintiff had, under sect. 58, sub-sect. 1 (viii.), of the *Settled Land Act*, 1882, all the powers of a tenant for life, including a power of leasing; and under sect. 45, sub-sect. 3, a lessee dealing in good faith with a person in the position of a tenant for life is not concerned to inquire whether the notices required by that section before granting the lease have been given: *Hatten* v. *Russell* (1).

Marten, Q.C., and *Vernon R. Smith*, for the Defendant:—

The Plaintiff had constructive notice of the lessor's title, and is not protected by sect. 45, sub-sect. 3, inasmuch as that sub-section only applies where there are trustees for the purposes of the Act, and not where, as here, there are no trustees at all—a

case now met by sect. 7 of the *Settled Land Act*, 1890. The lease, to be effectual under the Act of 1882, must be "expressed or intended to operate" under the Act: sect. 20, sub-sect. 2. Here the lease is neither so "expressed" nor "intended." Moreover, the title, depending as it does on a question of fact as to whether the Plaintiff was, when he took the lease, acting in good faith or not, is too doubtful to be forced upon a purchaser: *Patman* v. *Harland* (1); *Wheelwright* v. *Walker* (2); *Duke of Marlborough* v. *Sartoris* (3); *In re Briggs & Spicer* (4); *Freer* v. *Hesse* (5); *Settled Land Act*, 1882, s. 53.

KEKEWICH, J.:—

The questions of law in this case arise under the *Settled Land Act*, 1882; and although several cases have been cited which are more or less useful, yet I think there is a novelty about more than one of the questions which have now to be decided. The lease, the sale of which was the subject of the contract, is one of a simple character; it is made by *W. G. Hoskins*, apparently as absolute owner, and it does not refer to any instrument whatever, nor does it refer to the *Settled Land Act*. It is a building lease. There is a covenant by the lessee to spend a certain sum of money in building, and there are other covenants of the usual character which, it is admitted, bring the lease within the *Settled Land Act* in point of usual conditions, if it otherwise can be supported as a lease under that Act. I have already said that the lease does not purport to be made under the statutory power; but the lessor did not himself purport to make it under the statutory power. He has himself stated in his evidence that he believed himself to be absolute owner; and perhaps it would not be too much to say he had never heard of the *Settled Land Act*; certainly it does not seem to have been present to his mind when he granted the lease; and the lessee also accepted the lease believing that the lessor was owner in fee. Of course, the lessee, being a solicitor, must be taken to have known the *Settled Land Act*; but at the time it evidently did not enter into his mind that the lease was

(1) 17 Ch. D. 353.
(2) 23 Ch. D. 752.
(3) 32 Ch. D. 616, 623.
(4) [1891] 2 Ch. 127.
(5) 4 D. M. & G. 495, 504.

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intended to be granted under that Act. There were no trustees under the Act; there was no settlement of which there could be trustees within the Act—at least, there was none known to the parties; and no attempt was made to appoint trustees for the purposes of this lease; therefore, no notice was given to trustees, and so far the provisions of the Act were not complied with. It now turns out that the lessor was tenant for life only—tenant by the curtesy—and, therefore, the lease, if valid at all, must take effect under the *Settled Land Act*. The questions are: First, whether it is a lease under that Act; and, secondly, whether, as some of the provisions of the Act have admittedly not been complied with, Mr. *Mogridge* can force the title on the Defendant, and whether Mr. *Mogridge*, the lessee, is fixed with notice of the defects arising from the want of compliance by the lessor with the provisions of the Act so as to prevent his forcing the title on the Defendant as purchaser from him. These questions turn on several sections of the Act, and also on the general purview of the Act. On the latter point I do not propose to say anything.

The Act has been discussed in many cases, some of which have been cited before me, including *Hatten* v. *Russell* (1), before Mr. Justice *Kay*, where the policy of the Act with reference to transactions of this kind—though, no doubt, in that case the transaction was a sale—is plainly stated; and the policy is equally plainly stated in many other cases. As regards the Act itself, I must refer to one or two sections, and especially, first, to sub-sect. 2 of sect. 20. That sub-section refers to a "deed," which by sub-sect. 1 includes a deed executed on "a sale, exchange, partition, lease, mortgage, or charge." Sub-sect. 2, therefore, includes a "lease," which we have here; and it says that "such a deed" (such a "lease," I might say), "to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass," and so forth.

The first question on that sub-section is a mere question of grammatical construction—whether the words "under this Act" are to be read in connection with the first "operate" as well as with the second, it being suggested on behalf of the Plaintiff that it should not be so read. I cannot follow that. When, as

(1) 38 Ch. D. 334.

here, you find two verbs twice repeated, and only differently because there is a different tense, I think you must conclude that it is intended to be connected with what follows under each head; and that, therefore, the sub-section must be read as if the draftsman had said: "In the manner to and in which it is expressed or intended to operate under this Act, and can operate under this Act." That is a small point; but one necessary to be decided before passing on to the next.

That next question is, what is necessary to constitute this lease a lease "expressed or intended to operate under this Act." The first and obvious but extremely important thing to notice is that the Legislature has drawn a distinction between "expressed" and "intended." I conclude that what is "intended" is something which is not "expressed." Everything which is expressed must be covered by the word "expressed." What is not "expressed" may or may not be "intended." It would be a misreading of language to suppose that only what is expressed comes in under this sub-section as "intended."

Then, there being no question here about the meaning of the word "expressed," I have to consider whether this lease was "intended to operate under this Act." By what rule am I to decide that? As I have already said, the lessor did not know that he was exercising the power given by the Act; he probably did not know that there was such a power, and also did not intend such a power to be exercised, even if he knew it existed. Therefore, it would be idle to say that there was any intention on his part, in the sense of a formulated plan or scheme, of giving effect to the power under the statute; so that, if that were the proper view, the Plaintiff's case would certainly fail. I do not think it is the proper view; and here I must pause to consider an argument addressed to me, that this is a statutory power, and that, being a statutory power, it must be strictly exercised in all its details. I think that argument is drawn by analogy from the doctrine respecting statutory jurisdiction, which, of course, is not so elastic as the general jurisdiction of the Court. I see no distinction between a statutory power of sale, and a power of sale reserved in a deed. In either case it really becomes part of the contract. In the one case it is agreed to by the parties expressly

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and written out in the parchment which they execute; and in the other case it is incorporated into the contract by the Act of Parliament, and becomes part of the contract by force of the Act of Parliament. I see no distinction whatever, for the purposes of construction, between a power such as is given by the *Settled Land Act* or such as is given by other statutes—such as the powers given by *Lord Cranworth's Act*—and a similar power given in terms by a will or settlement. Therefore, I proceed to consider this power just as if it were contained in a settlement or in a will.

How do we, as lawyers, consider whether a person intends to exercise a power? I think it is a good rule first to ascertain whether, undoubtedly, the person intended the effect to follow. About that there is no question here. There is no question of the demise having been made upon certain terms and conditions. Mr. *Hoskins* intended that Mr. *Mogridge* should be his lessee under this deed upon certain terms. The next thing one has to look at is, whether he intended to constitute Mr. *Mogridge* as his lessee by any special means. There is an old rule, which I think is applicable to this case, that where you find an intention to effect a particular object, and there is nothing to exclude the intention to effect it by a power which is available, and there are no means of effecting it except by that power, then you conclude that the intention was to effect it by means of that power, because otherwise it would not be effected at all. That rule has been applied in a large number of reported cases, and I see no reason why it should not be applied here. I think, therefore, that, notwithstanding the existence of the statutory power of leasing was not present to the minds of the parties in this case, and really was absent from their minds, I must hold that there was in law an intention that this lease should operate under this Act—that is to say, there was an intention that it should operate, and that it should operate in the only way in which it could operate—that is, under the Act.

But, then, that by no means gets rid of the section, because there is a further objection that, though the lease may have been intended to operate under the Act, yet it cannot do so; and that really depends upon the question of the absence of trustees, and therefore of notice given to trustees. It is said that notice ought

to have been given, and that, as notice ought to have been given, trustees ought to have been appointed; that, if there were no trustees, as apparently there were not, then trustees ought to have been appointed and notice ought to have been given to them; and that in that matter the lessor has made default, for he has not done everything which the Act says he ought to have done. But there is ample authority for the position that this is not a matter with which the purchaser is concerned, and a lessee is in the position of a purchaser. That was so held by Mr. Justice *Kay* in *Hatten* v. *Russell* (1), and it was also held by Mr. Justice *Chitty* in *Duke of Marlborough* v. *Sartoris* (2). Those two cases may be taken as examples of many authorities on the point. Mr. Justice *Kay's* decision in *Hatten* v. *Russell* goes even further than that, and says that default of the lessor in not giving notice is not a defect of the title of the tenant for life himself. Therefore, even assuming that the lessor did not do what he ought to have done, yet the title is complete, and cannot be found fault with on that ground.

Reference was made to the 53rd section of the Act, which says that a tenant for life, in exercising any power under the Act, shall be deemed to be in the position and have the duties and liability of a trustee for the parties entitled under the settlement. On that section it was argued that a lease could not be made without the concurrence of the trustees—without there being trustees to receive notice, and the more so because the trustees are persons who have certain duties cast upon them; that even in the case of a lease, where there is no money to be received, they must have an opportunity of considering the matter; and that, as the tenant for life is a trustee for the remaindermen and other parties interested, he cannot possibly make a lease in the absence of those persons to whom notice must be given. It is not necessary for me now to define the duties of a tenant for life when he is admitted to be in the position of a trustee. The matter was considered at some length by Mr. Justice *Chitty*, and by the Court of Appeal, in *In re Earl of Radnor's Will Trusts* (3); but I find nothing there, or

(1) 38 Ch. D. 334. (2) 32 Ch. D. 616, 623.
(3) 45 Ch. D. 402, 417.

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elsewhere, to shew that the tenant for life is bound, as regards the purchaser, to have trustees to whom he can give notice.

If that be the right view, the question arises whether Mr. *Mogridge* is in a position to say that, as far as he was concerned, all was fair and above-board, for the 3rd sub-section of sect. 45, which provides for notice being given to trustees, only exempts a person dealing with the tenant for life from any consequence following from non-compliance with the Act, if he deals "in good faith with the tenant for life," in which case he is not concerned to inquire respecting the giving of any such notice as required by the section. Those words which I have just read were commented upon by Mr. Justice *Chitty* in the case which has been already referred to of *Duke of Marlborough* v. *Sartoris* (1), where he pointed out the difficulty and the inconsistency with the Act of a purchaser being required to have any notice brought before him as part of his title. But here the position is extremely peculiar, and, so far as I know, the case goes beyond any that has yet come before the Court. Mr. *Mogridge* did not act as the solicitor of Mr. *Hoskins* in the matter of the lease. About that I have no doubt. Mr. *Hoskins* had no solicitor. He had apparently a legal friend, a gentleman who, however, was not a practising solicitor, but a solicitor's clerk, and he did not act as Mr. *Hoskins'* solicitor. Mr. *Mogridge* was a solicitor himself, and he drew the lease himself, but he drew it on his own behalf and not as Mr. *Hoskins'* solicitor. Although he could have had access to any materials which Mr. *Hoskins* had if he had required it, I do not think there is anything to lead me to the conclusion that he, as a matter of fact, saw anything at all; but he might have done so. There was no concealment between them, and that was his position. Of course he had notice of the lessor's title. Every man dealing with a lessor, as with a vendor of a lease, has notice of the lessor's title. If the lessor has no title, the lease fails, whether there be good faith or not as between the lessor and the lessee. Mr. *Mogridge* must, therefore, be taken to have known that Mr. *Hoskins* could only make the lease as tenant by the curtesy—that is, by virtue of the *Settled Land Act*; and it may be assumed at once,

(1) 32 Ch. D. 616, 623.

as almost certainly was the fact, that he knew there were no trustees, because he knew of no settlement. He thought there was no settlement, and it may be said that therefore he also knew that no notice had been given to trustees under the Act; but was he bound to inquire? If he had been Mr. *Hoskins'* solicitor, a different question might have arisen; but I say distinctly that he was not Mr. *Hoskins'* solicitor; the trustees might have been appointed at any time, and notice might have been given at any time; and though probably it never entered his head that trustees would be appointed or that notice would be given, still the Act says that that does not concern him so long as he deals in good faith. As I have already pointed out, Mr. Justice *Kay* held, in *Hatten* v. *Russell* (1), that that is not a defect of title, and I am only considering here a question of defect of title.

But the argument is that Mr. *Mogridge* was not dealing in good faith. Now, what does "good faith" mean? What is meant by those two English words which are the exact equivalent in every sense of the expression which is perhaps more commonly used, though not more correctly or properly, *bona fides*? I think that the best way of defining the expression, so far as it is necessary or safe to define it, is by saying that it is the absence of bad faith—of *mala fides*. If the tenant for life is not doing his duty under the 53rd section; if, in exercising a power under the Act, he is not having regard to the interest of all parties entitled under the settlement; if, in making a lease in a form within the Act, he is attempting really to make a lease which is not in substance within the Act; if in any other way he is evading the Act—then that is not dealing in "good faith." But I fail to see any want of dealing in good faith with a tenant for life by accepting a lease from him without inquiring whether he has given notice to the trustees, or whether there are trustees at all, or even without taking the objection that there are no trustees and that no notice has been given. To say that anything of that kind was not dealing in good faith would be, in my opinion, to cut down the words, "is not concerned to inquire respecting the giving of any such notice," in such a way as to

(1) 38 Ch. D. 334.

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hamper the usefulness of the Act and to contravene its policy. I see nothing here in Mr. *Mogridge's* dealing which was otherwise than in good faith. As regards this part of the case, I have not the slightest doubt that he was a witness of truth, and I see nothing wanting in good faith on his part.

There is one question more. It is said that there is a question of fact which I cannot now decide satisfactorily, and that, therefore, I ought, on that ground, to refuse to grant specific performance. I fail to see what the relevancy of that question of fact is. It may be that hereafter some document may turn up—some evidence of persons now unknown to the Plaintiff or Defendant—which may convince the Court that Mr. *Mogridge* was not dealing in good faith; but it seems to me that I have to decide upon such evidence as I now have before me, and that I have no right to refuse the Plaintiff specific performance because there may turn out at some future time some evidence of which at the present moment I neither know anything nor have the slightest suspicion. When the evidence is unsatisfactory, where it leaves a gap so that the Court is not sure that it is proceeding on a safe basis, then, no doubt, it would be right to refuse specific performance; but if there is every reasonable ground for believing that all the facts are before the Court, so as to enable it to arrive at a clear conclusion, it would be, to my mind, entirely wrong to hesitate to give a Plaintiff relief. *In re Briggs and Spicer* (1), before Mr. Justice *Stirling*, was cited on this point. Mr. Justice *Stirling* refers (2) to the judgment of Vice-Chancellor *Leach* in *Emery* v. *Grocock* (3) as being the main rule which governs the Court in such cases. That learned Vice-Chancellor says: "If the case be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." I do not understand that judgment to mean that, if it were the duty of the Judge to leave it to the jury to say whether they believed

(1) [1891] 2 Ch. 127. (2) [1891] 2 Ch. 133.
(3) 6 Madd. 54, 57.

a man or not, then the title would be doubtful, for it is the duty of a Judge trying a case without a jury to settle that himself. What Sir *John Leach* points out is the effect of the evidence, not whether the evidence is in itself true.

In this case I consider, as I have already said, that Mr. *Mogridge* has given me the true facts, and I have before me a number of documents which support it. If I had to direct a jury on the point, I should leave it to them simply in this way: "If you believe Mr. *Mogridge*, there is no doubt about the question at all; Mr. *Mogridge* was acting in good faith; there is not a word in his evidence, either in examination-in-chief or cross-examination, to displace his good faith. Do you believe him or not?" I must put that question to myself, and I answer it by saying that I do believe him; therefore, believing that he is telling the truth, believing that he was acting in good faith, I give a clear direction to myself in favour of the fact, and it follows that I am bound to grant specific performance, so far as that point is concerned, even though that conclusion may be liable to be disturbed, as every conclusion of fact is liable to be disturbed, hereafter.

G. I. F. C.

C. A.

The Defendant appealed, and the appeal came on for hearing on the 23rd of May, 1892.

Marten, Q.C., and *Vernon R. Smith*, for the Appellant.

Warmington, Q.C., and *Upjohn*, for the Respondent.

Marten, in reply.

[The same arguments were used, and the same cases cited, as appear in the report of the hearing before Mr. Justice *Kekewich*; and, in addition, the case of *In re Marquis of Ailesbury's Settled Estates* (1), was referred to by counsel for the Respondent.]

1892. June 2. LINDLEY, L.J.:—

This is an appeal from a judgment of Mr. Justice *Kekewich*, directing specific performance of an agreement by the Defendant

(1) [1892] 1 Ch. 506.

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to buy a leasehold property held by the Plaintiff under a lease granted to himself. The Defendant objects to complete the purchase, on the ground that the lease is invalid, or that, if not invalid, the Plaintiff's title is so questionable that the Defendant ought not to be compelled to take it.

The case is peculiar and important, both to the parties and to purchasers and lessees from tenants for life.

On the 31st of October, 1884, a person named *Hoskins*, who was a baker in *Exeter*, granted the lease in question, which was a building lease for ninety-nine years, to the Plaintiff. The Plaintiff was a solicitor, and he prepared the lease himself. He did not inquire into *Hoskins*' title, but assumed him to be tenant in fee. It turns out now that *Hoskins* was only tenant by the curtesy, that the property had belonged to his wife in fee under a will, and that there were no trustees of it.

Upon the authority of *Patman* v. *Harland* (1), the Plaintiff must be taken to have had constructive notice that his lessor was tenant by the curtesy, and constructive notice of the will under which his wife became entitled to the property. There might or might not be trustees for the purposes of the *Settled Land Act*; and I do not think that *Hoskins* must be held to have had notice that there were none in fact.

Hoskins' title to the property for his life did not depend on the existence or non-existence of trustees; although, whether his title was legal or equitable, would of course depend on the terms of the will under which his wife became entitled to the property.

Hoskins, as tenant for life, could have granted the lease in question under sects. 6, 7, and 8 of the *Settled Land Act*, which enable tenants for life to grant leases.

All the requisites of these sections were in fact complied with. But it is said that, as he never intended to grant a lease under that statute, it cannot be invoked to support the lease. This argument is based on sect. 20, sub-sect. 2; but that section has no reference to conveyances made under previous sections; it confers another and different power of appointment on tenants for life, and the words, "to the extent and in the manner to and

(1) 17 Ch. D. 353.

in which it is expressed or intended to operate," mean not further or otherwise than expressed or intended. Even if this section had any application to the case, the words in question ought not to be construed so as to defeat the obvious intention of both parties, which was that the lease should be a good and valid lease. The old maxim applies: "*Quando res non valet ut ago, valeat quantum valere potest.*"

But then it is said that under sects. 38, 45, and 53, *Hoskins* was guilty of a breach of trust in not obtaining the appointment of new trustees, and in not giving notice to them, and that this breach of trust affects the Plaintiff's title. Now, I think that *Hoskins* ought to have followed the directions contained in these sections, and might, perhaps, have been restrained by the remainderman from granting a lease until he had done so, as in *Wheelwright* v. *Walker* (1). That, however, was a case of a sale, and the purchaser did not propose to pay the money into Court. I also think that the omission to take these steps might prevent the tenant for life from obtaining specific performance against an unwilling lessee. But, assuming all this, the omission to take these steps does not, in my opinion, invalidate the title of a lessee who has acted in good faith. Sect. 45, sub-sect. 3, in my opinion, clearly protects him and his title.

It would be truly ridiculous to say that a person is bound to see that there are trustees, when, if there are, he need not see that they have notice of what the tenant for life is doing.

The *Settled Land Act*, 1890, sect. 7, sub-s. 2, which was relied upon in support of the argument of the Defendant, and which at first sight appears to support it, really has no such effect when properly understood. That section was passed to relieve a tenant for life from the necessity of appointing trustees in a particular case, not to fetter him, or to embarrass persons dealing with him.

Even if the Plaintiff had known that there were no trustees, it would not follow that his title would be bad. Of course, if the Plaintiff had, by conniving at a breach of trust, done the remainderman an injury, he would personally be liable to him for it; but even then a purchaser from him would, I think, be safe. The

(1) 23 Ch. D. 752.

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observations of this Court on sect. 53 in *In re Marquis of Ailesbury's Settled Estates* (1), go far to shew that the title would be good even if there were no trustees, and the purchaser or lessee knew, in fact, that such was the case. However this may be, the doctrines of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bonâ fide* with tenants for life when exercising their powers under the *Settled Land Act.*

There remains the point that the title of the Plaintiff depending on his *bona fides* ought not to be forced on the Defendant. This must be looked at as a practical matter. The Defendant's title will not be practically open to attack. Theoretically an attack upon it, based on *mala fides* and production of evidence in support of the attack, is no doubt conceivable; but the danger is, I am convinced, purely imaginary, and the existence of such a danger ought not to induce the Court to refuse relief to the Plaintiff. Even if *mala fides* were proved, I am by no means satisfied that the lease would be bad, as all the conditions prescribed by the enabling sections were duly complied with.

The appeal, therefore, ought to be dismissed with costs.

BOWEN, L.J.:—

I concur.

KAY, L.J.:—

On the 31st of October, 1884, a building lease for ninety-nine years was granted by *William George Hoskins* to the Plaintiff, who subsequently erected buildings on the land at an expense of £1200.

He has contracted to sell this leasehold property to the Defendant, and now sues for specific performance of that contract. The defence is, (1.) that the lease is invalid, and (2.) that at any rate the title is too doubtful to force upon a purchaser.

It appears that both lessor and lessee assumed when the lease was granted that *Hoskins* was owner in fee simple. In fact, he was only tenant by the curtesy for his life. As such, he had power to grant the lease under the *Settled Land Acts.* But

(1) [1892] 1 Ch. 536, 545.

there were no trustees of the settlement for the purposes of those Acts, and of course the preliminary notice of his intention to grant the lease, required by sect. 45 of the *Settled Land Act*, 1882, which by sect. 5 of the *Settled Land Act*, 1884, may be a general notice of intention, was not given.

The Plaintiff had constructive notice of his lessor's title. This is not altered by sect. 2 of the *Vendor and Purchaser Act*, 1874, or by sect. 3, sub-sect. 1, of the *Conveyancing Act*, 1881. The only effect of those statutes is to disable a lessee or assigns to call for the lessor's title, unless he expressly stipulates in the contract that he may do so: *Patman* v. *Harland* (1).

The Plaintiff, therefore, must be treated as knowing, at the time of the lease, that the lessor had only a life estate, and could only grant the lease under the powers of the *Settled Land Act*. He had no knowledge that there were no trustees of the settlement for the purposes of that Act. Perhaps he must be treated as knowing that there was no settlement which appointed such trustees. It is suggested that, as he was dealing with the lessor in the belief that he was owner in fee, he would not suppose that any trustees for the purposes of the *Settled Land Act* had been appointed by the Court. But if he is to be treated as if he knew that the lessor was a tenant for life, unless he was bound to inquire whether trustees had been so appointed, I do not think knowledge that they were not appointed should be imputed to him. It is not logical, and it would be a strange extension of the doctrine of constructive notice to treat the Plaintiff as having notice of the lessor's real title, and therefore knowing that he was tenant for life, and also as having notice that there were no trustees of the settlement, for the purpose of the *Settled Land Acts*, because he believed the lessor to be owner in fee simple.

I do not think he should be considered to have knowledge or notice that there were no such trustees.

But he had notice of the lessor's title, and if the absence of trustees affected the title, or the lessor's power to grant the lease, the notice may include notice of this defect.

Did it affect the lessor's title to demise under the Acts?

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The scheme of these Acts is unquestionably to give a large power of selling and letting to tenants for life, and to fetter such power as little as possible between the tenant for life and a purchaser or lessee. Sect. 6 of the Act of 1882, which relates to leasing, contains no restriction of any kind, except the length of the term, which in the case of a building lease must not exceed ninety-nine years. Sect. 7 does contain restrictions. The lease must be by deed, to take effect in possession within twelve months after its date, and at the best rent, and it must contain a covenant for payment of the rent, a condition of re-entry, and so on; and sect. 8 relates to building leases which must be in consideration of the erection of buildings. There is no express provision that the lease shall be void unless these considerations are observed; but, following the analogy of leases under powers in a settlement, that would probably be the case.

However, so far in these enabling clauses, there is nothing about trustees of the settlement. The first mention of them is in sect. 2, which defines that trustees with certain powers of sale, or the persons declared by the settlement to be trustees of the settlement for purposes of the Act, are, "for purposes of this Act trustees of the settlement." The next mention of them seems to be in sect. 15, which requires their consent to the sale of the mansion-house. They are mentioned again in sects. 21 and 22 relating to capital moneys and their investment, and in sect. 26, when their approval is required to certain applications of capital money.

Sects. 38 to 45 inclusive are a group of sections under the heading "Trustees." They provide for the appointment of trustees by the Court when there are none, for the payment of capital money to not less than two such trustees, and empower them to give effectual receipts. Sect. 41 gives them the usual indemnity; and sect. 42 provides that they are not to be liable "for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do"; and otherwise very carefully protects them from personal liability for nonfeasance as distinguished from misfeasance.

Sect. 44 runs thus: "If at any time a difference arises between

a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit."

Then sect. 45 requires the tenant for life, "when intending to make a sale, exchange, partition, lease, mortgage, or charge," to give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters addressed to them, not less than a month before making such sale, lease, &c., or of a contract for the same. The trustees not to be less than two at the date of such notice. Then follows an important provision: "A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

There is no suggestion in this case of any bad faith on the part of the lessee. Therefore, if there had been trustees of the settlement he would not have been concerned to inquire whether notice had been given to them, and of course the lease would have been good though notice was not given.

In the case of a building lease, where there is no payment to be made to the trustees, the only object of giving such notice that I can see is to enable the trustees if they think fit to exercise some supervision, and to bring any differences between them and the tenant for life before the Court under sect. 44 of the Act of 1882. But by sect. 42 they are not bound to do so. They are not liable for not doing so; and as the notice to them may now be of a general intention to make leases, and may be given long before the actual lease, their supervision, if they are intended to have any, is of the vaguest and most indefinite character.

Now, can it fairly be said to be the effect of this legislation that a building lease granted by a tenant for life when there are no trustees of the settlement for the purposes of the *Settled Land Act* is, *ipso facto*, void or voidable at the suit of remaindermen under the settlement? I cannot find that the Act makes the existence of such trustees a condition of the power of the

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tenant for life to grant the lease. There is an express provision that the lessee need not inquire whether notice has been given to them. If he knew there were no trustees, or that notice had not been given, probably he would be justified in refusing to complete, and the Court would not compel him to do so, and would even restrain the tenant for life from making a sale or lease under such circumstances: *Wheelwright* v. *Walker* (1). But there seems to me a very sufficient reason for this. By sect. 38 of the Act of 1882, the application to the Court to appoint trustees may be made by the tenant for life, or any other person having an interest in the land under the settlement. The section does not empower an intending lessee to apply. The tenant for life may apply for such appointment, and it would seem to be his duty to do so, because sect. 53 provides thus: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Being in that fiduciary position, it would be his duty to do everything regularly, and in strict compliance with the Act; and omitting to do so would be on his part a breach of trust. The intention seems to be to make him personally responsible, but not by such an omission as the neglect to appoint trustees to render the lease invalid.

The case of a sale under the Act is somewhat different. By sect. 22 capital money arising under the Act must be paid to the trustees, or into Court, at the option of the tenant for life. But he can only have such option, *primâ facie*, when there are trustees, so that the purchaser could hardly pay his purchase-money without ascertaining that there were trustees to whom it might be paid.

Sect. 54 provides that on a sale, lease, &c., a purchaser or lessee, dealing in good faith with a tenant for life, shall, as against the parties entitled under the settlement, be conclusively taken to have given the best price or rent "and to have complied with all the requisitions of this Act." This section confirms the view that in the case of a lessee dealing in good faith the remedy,

(1) 23 Ch. D. 752.

if any, of the persons entitled under the settlement for any neglect of the provisions of the Act is to be against the tenant for life in his fiduciary character, not against the lessee, and is not to affect the validity of the lease.

I therefore come to the conclusion that the existence of trustees for the purpose of the Acts is not a condition of the power of the tenant for life to make the lease, and that a lessee dealing with him in good faith is not bound to inquire whether there are such trustees, and is not affected with constructive notice that there are none; and that the lease is a valid lease although there were no trustees.

A lessee has only constructive notice of the lessor's title, and the non-existence of trustees is not, in my opinion, a defect of the title of the tenant for life or of his power to grant the lease.

If the lessee knew that there were no trustees, or that the tenant for life had not given the trustees notice, he might, by accepting the lease under such circumstances, be implicated in the breach of fiduciary duty by the tenant for life. It might be said that he was not dealing then in good faith with the tenant for life. Good faith in that connection must mean or involve a belief that all is being regularly and properly done; and if the lessee has not that belief, it may be said that sect. 54 of the Act of 1882 does not protect him against an action by other persons entitled under the settlement. I must say that my present opinion is that if the lease were otherwise unobjectionable it could not be set aside because the lessee knew there were no trustees. It seems to me that the plaintiffs in such action might be required to shew that they were in some way damnified, and, if they could shew that, they might be entitled against both lessee and lessor to compensation as for a breach of trust, but not to have the lease, if for the best rent and otherwise unobjectionable, set aside. However, it is not necessary to give a decided opinion on this point, because I do not think that the lessee in this case had either knowledge or notice such as to make his acceptance of the lease a dealing not in good faith with the lessor.

Then, should the Court enforce specific performance in this case? To refuse it would be to throw doubt upon the validity of the lease. With any other remedy against the lessor or lessee

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which any person entitled under the settlement may have, the assign has no concern. If they have committed a breach of trust, so long as that does not affect the lease in any way, it cannot affect the purchaser of the leasehold interest.

I am, therefore, of opinion that the decree for specific performance was properly made, and that this appeal should be dismissed with costs.

Solicitors: *Gibbs, White, & Crocker; A. Harris.*

W. W. K.

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May 26, 27, 28, 30; *June* 3.

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[1892 L. 556.]

Copyright—Stage Play—Foreign Play—Right of Representation—Expiration of Right—Infringement—Registered Owners—Tenancy in Common—Right of one or more of Registered Owners to maintain Action—"Translation"—International Copyright Act, 1852 (15 & 16 *Vict. c.* 12), *ss.* 3, 4 [*Revised Ed. Statutes, vol. xi., p.* 284]—*International Copyright Act,* 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Retrospective Operation of Statute.*

The *International Copyright Act,* 1886, cannot be construed so as to revive or recreate a right which had expired before the passing of that Act, or so as to confer a new right on the former owner of an expired right without any fresh act done by him.

In March, 1879, the brothers *L.* acquired the dramatic copyright in a French play written for them in *France* by French authors; and in September, 1879, they were registered in *Great Britain* as the proprietors of the liberty to represent or perform it. *H.* made for the brothers *L.* an English translation of the play, and on the 27th of November, 1879, this translation was registered in *Great Britain,* and *H.* was registered as the proprietor of the copyright in it. In 1880 another English version of the play was performed in *England* by the brothers *L.* In 1886 two of the brothers *L.* died. In August, 1891, the Plaintiff took an assignment from the three surviving brothers *L.* of all their rights in the play, and any translation or adaptation thereof; and in February, 1892, he registered himself as the proprietor of all such rights. In an action for an injunction and damages brought by the Plaintiff in February, 1892, immediately after his registration, against the Defendants, who had performed an English version of the play in this country in October, 1891, and were advertising further performances:—

Held, by the Court of Appeal (affirming the judgment of *Kekewich,* J.) (1.) that under sect. 4 of the *International Copyright Act,* 1852, the dramatic copyright acquired by the brothers *L.* expired in November, 1884,

i.e., five years after registration of *H.'s* translation; (2.) that reading together (as was necessary) sect. 6 of the *International Copyright Act*, 1886, art. 14 of the *Berne* Convention, and clause 3 of the Order in Council giving effect to the Convention, there could be no infringement by the Defendants of any copyright in the French play as distinguished from the English translation of it; and (3.) that sect. 6 of the Act of 1886 did not revive or recreate expired copyright or confer any new right on the owner of an expired right without any fresh act done by him; and *held*, accordingly, that the Plaintiff had no right either to an injunction or damages in respect of a translation the copyright in which had expired before the Act came into force.

Per Kekewich, J.: Although the registered owners of a copyright take as tenants in common, and not as joint tenants—*Powell* v. *Head* (1)—yet any one or more of them may maintain an action against a stranger for an infringement of the entire copyright.

Per Kekewich, J.: A "translation" of a foreign play, in order that it may be protected under the law of International Copyright, does not necessarily require to be an absolutely literal translation; it is sufficient if it is substantially a translation.

APPEAL from Mr. Justice *Kekewich*.

In 1879, a troupe of pantomimists and acrobats, consisting of four brothers, named *George*, *William*, *Edward*, and *Frederick Hanlon-Lees*, known in the United States of *America* as "The *Hanlons*," and in *Europe* and *England* as "The *Hanlon-Lees*," commissioned two French dramatic authors in *Paris*, named *Blum* and *Toché*, to write a pantomimic play for them; and accordingly by an agreement in writing in the French language, dated the 11th of March, 1879, signed by *Blum* and *Toché*, and by *George Hanlon-Lees* on behalf of the troupe, *Blum* and *Toché* agreed to supply the troupe with a libretto of a pantomime in three acts, in which the troupe were to supply pantomimic scenes of their own; and by the agreement the manuscript was expressed to be transferred to the troupe, with the sole right of performance in *France* and abroad, in consideration of 3000 francs (£120) in cash and a royalty of 5 per cent. on the gross receipts from all performances of the pantomime. Messrs. *Blum* and *Toché* thereupon wrote a play in three acts, under the title of "*Le Voyage en Suisse*." The play was never printed, but always remained in manuscript only. It was first produced at the *Théâtre des Variétés*, in *Paris*, on the 30th of August, 1879.

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On the 5th of September, 1879, *Blum* and *Toché* were registered in *England*, at *Stationers' Hall*, under the *International Copyright Act*, 1844 (7 & 8 Vict. c. 12), and the French Convention of 1851, as the proprietors of the liberty (not the "sole" liberty) of representation or performance of the play, the registration being thus within three months of the first production of the play in what is termed, in the *Berne* Convention of 1887, "the country of origin," namely, *France*.

On the 12th of September, 1879, the four brothers, *Hanlon-Lees*, were similarly registered at *Stationers' Hall* as the proprietors of the liberty (not the "sole" liberty) of representation or performance of the play.

In November, 1879, the *Hanlon-Lees* employed *John Hollingshead*, the lessee and manager of the *Gaiety Theatre, London*, to make an English translation of the play, which he accordingly did in co-operation with *Blum* and *Toché*; and on the 27th of November, 1879, *Hollingshead* was registered at *Stationers' Hall* as the proprietor of the copyright of this translation. In March, 1880, the translation was printed and published in book form, in *London*, under the title of "*The Voyage in Switzerland.*"

On the 27th of March, 1880, the *Hanlon-Lees* gave the first of a series of performances in *London*, at *Hollingshead's* theatre, the *Gaiety*, of an English version or adaptation of the play (not a literal translation) by one *Robert Reece*. This version was also printed and published in *London*. These performances proving successful, the *Hanlon-Lees* shortly afterwards arranged with Messrs. *Blum* and *Toché* to buy up the latter's royalty of 5 per cent. (excepting the royalty for all performances in *France* and *Belgium*) for 12,000 francs, which the *Hanlon-Lees* accordingly paid, and obtained from them a document in French, dated the 22nd of May, 1880, of which the following is a translation:—

"Received from Messrs. *Hanlon-Lees* and *Agoust*, the sum of twelve thousand francs for the re-purchase of the contract which they had entered into with us, and according to which they owed us five per cent. of the receipts of each performance of '*Le Voyage en Suisse*' abroad. Messrs. *Hanlon-Lees* and *Agoust* are, therefore, henceforth proprietors of the rights of '*Le Voyage en*

Suisse' saving in *France* and in *Belgium.—Paris*, the 22nd of May, 1880.

"*Ernest Blum. Raoul Toché.*"

Agoust was at that time a member of the *Hanlon-Lees* troupe, but afterwards left it.

On the 10th of August, 1881, three registrations were effected at *Stationers' Hall*, namely, (1.) a registration of the above-named four brothers, *Hanlon-Lees*, and a fifth brother, *Alfred*, as the proprietors of the "sole" liberty of representation or performance of *Reece's* version or adaptation of the French play, and of which version *Reece* was entered in the registration as the "author or composer"; (2.) a registration of one *Henry Pettitt* as the proprietor of the "sole" liberty of representation or performance of another English version or adaptation, and of which version he was also entered in such registration as the "author or composer"; and (3.) a registration of the five brothers, *Hanlon-Lees*, as assignees of the "sole" liberty of representation or performance of *Pettitt's* version. *Pettitt's* version was subsequently performed by the *Hanlon-Lees* troupe at *Plymouth* in 1881.

In 1886, *Frederick* and *Alfred Hanlon-Lees* both died.

On the 7th of August, 1891, the three surviving brothers, *George*, *William*, and *Edward*, who were then in *America*, by their attorney entered into an agreement with the Plaintiff *Charles Lauri*, a pantomimist and acrobat in *England*, for the sale and assignment to him for value of all their rights for the *United Kingdom* and *Ireland* of and in the play "*Le Voyage en Suisse*," and any English translation or adaptation thereof. The Plaintiff duly paid his purchase-money under that contract. The Plaintiff then made arrangements for the performance of the play in the provinces, and for that purpose expended, it was said, some £1000 or £1200 in necessary machinery and appliances; but about the beginning of October, 1891, the Defendants "*Renad Frères*," a Parisian troupe of pantomimists, commenced issuing circulars and advertisements in *England*, announcing their intention of shortly coming over and giving performances of the French play or a new English adaptation thereof.

In order to complete his legal title to the rights in the play, and so to place himself in a position to prevent *Renad Frères*

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from acting on their advertisements, the Plaintiff, on the 7th of December, 1891, obtained an assignment, by deed, from *Hollingshead* to himself, the Plaintiff, absolutely, of all his, *Hollingshead's*, copyright and right of representation in the published English translation, "*The Voyage in Switzerland*"; and on the 27th of February, 1892, the Plaintiff effected in his name the four registrations following: (1.) of the last-mentioned assignment from *Hollingshead*; (2.) of the assignment under the contract of the 7th of August, 1891, from the three surviving *Hanlon-Lees* brothers to the Plaintiff of the liberty of representation of the original play, "*Le Voyage en Suisse*," under the registration of the 12th of September, 1879, in the names of themselves and their deceased brother, *Frederick*; (3.) of the assignment under the same contract of the 7th of August, 1891, from the same three surviving *Hanlon-Lees* brothers to the Plaintiff of their sole liberty of representation of *Reece's* English version or adaptation of the play under the registration of the 10th of August, 1881, in the names of themselves and their two deceased brothers, *Frederick* and *Alfred*; and (4.) of the assignment under the same contract of the 7th of August, 1891, from the same three surviving *Hanlon-Lees* brothers to the Plaintiff of their sole liberty of representation of *Pettitt's* English version or adaptation under the registration of the 10th of August, 1881, in the names of themselves and their two deceased brothers.

The delay in these registrations was accounted for by the absence from *England* of the *Hanlon-Lees*, who were travelling about in *America*, and by the consequent difficulty of communicating with them for the purpose of registration.

The Defendants *Renad Frères*, and the Defendant *Mulholland*, a theatrical manager who had associated himself with them in the management of their projected English tour, had in the meantime produced and performed in *London* and the provinces another English adaptation of the French play under the title of "*The Swiss Express*," in which the Defendants *Renad Frères* took part, the first performance being given in *London* on the 26th of December, 1891. It was said that the Defendants introduced into their performances new tricks and incidents. Further performances having been advertised to extend over several

months, the Plaintiff, on the 27th of February, 1892—that is, on the same day of and immediately after the last-mentioned registrations—issued his writ in this action, claiming an injunction, damages, and other relief.

On the 1st of March, 1892, the three surviving *Hanlon-Lees* brothers executed a deed of assignment to the Plaintiff of their rights comprised in the contract of the 7th of August, 1891, and on the same day the Plaintiff served the Defendants *Renad Frères* and *Mulholland* with notice of motion for an *interim* injunction to restrain them, their servants and agents, "from announcing for representation by means of advertisements, or by the circulation of play-bills, or in any other manner, and from representing and performing, or causing to be represented or performed, the dramatic piece or entertainment, '*Le Voyage en Suisse*,' or '*The Swiss Express*,' or any other dramatic piece or entertainment of which the title, scenes, or incidents are copied or imitated, or colorably altered from the title, scenes, or incidents of the Plaintiff's drama, '*Le Voyage en Suisse*,' or '*The Voyage in Switzerland*,' and from in any other manner infringing the Plaintiff's copyright and performing rights in the said dramatic piece."

The motion came on for hearing before Mr. Justice *Kekewich* on the 29th of April, 1892.

It appeared from the evidence that the Defendants had on their programmes announced their play as "an entirely new version of the celebrated French pantomime, '*Le Voyage en Suisse*,' in three acts, entitled '*The Swiss Express*,' adapted by *Arthur H. Gilbert* and *Charles Renad*," and that the scenes and incidents and dialogues in it were almost identical with those of the original French play.

M. *Doumere*, a French advocate, made an affidavit in support of the motion, in which he said that, according to French law, the combined effect of the documents of the 11th of March, 1879, and the 22nd of May, 1880, was to give the brothers *Hanlon-Lees* the full and entire property in the original French play, including the copyright and performing right; and that (subject to the royalty or authors' fee of 5 per cent. for all performances in *France* or *Belgium*), they were entitled to all publishing,

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translation, and performing rights, and to fully and effectually dispose of the same as they might think fit.

With regard to *Hollingshead's* published translation, it appeared from the Plaintiff's own evidence that it was not a literal translation of the original play, but omitted several lines in each act, and contained, besides, several additions. One of the Defendants' witnesses, however, stated that he had compared the translation with the manuscript of the original, which was in the possession of the Defendants *Renad Frères*, and found that it was "substantially a translation."

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff:—

We say we have the same rights in "*Le Voyage en Suisse*" as if it were an English play: sects. 2 and 3 of Order in Council of the 28th of November, 1887, adopting the *Berne* Convention" (1), which is retrospective; *Berne* Convention, arts. 2, 9, 14–21, and Final Protocol, sect. 4 (2); *International Copyright Act*, 1852 (15 & 16 Vict. c. 12), s. 6; *International Copyright Act*, 1886 (49 & 50 Vict. c. 33), s. 6.

Scrutton, and *H. Hulse*, for the Defendants *Renad Frères*:—

First, I contend that it was open to any one to perform in *England* a translation of "*Le Voyage en Suisse*," because the right of translation had lapsed, or "fallen into the public domain in the country of origin," by the end of 1889, if not before.

If there was an authorized translation of the work, it was the translation by *Hollingshead* on the 27th of November, 1879. The five years' protection, limited by sect. 4 of the *International Copyright Act*, 1852 (15 & 16 Vict. c. 12)—which extended the first *International Copyright Act*, 1844 (7 & 8 Vict. c. 12)—therefore expired on the 27th of November, 1884, after which date any one could translate it. Moreover, the conditions as to the deposit of copies within three months, and otherwise, required by sect. 8 of that Act, were not complied with; so that on that ground the authors had lost all rights in their work even in 1879; or, if not, they lost it at the end of the five years. Again,

(1) *Scrutton* on Copyright, 2nd Ed. pp. 255–6.

(2) *Scrutton* on Copyright, 2nd Ed. pp. 257, 259, 260, 262–3.

if the authors had any right to stop the production of an unauthorized translation of their work, that right only extended for ten years from the date of publication of the original work: *International Copyright Act*, 1886 (49 & 50 Vict. c. 33), s. 5. On any of these grounds, therefore, the right of translation had lapsed before we had anything to do with the matter. Moreover, this translation is admitted by the Plaintiff himself not to be a literal translation, and a translation, to be protected, must be full: *Wood* v. *Chart* (1). The *Berne* Convention does not apply, because its adoption by the Order in Council was in 1887—that is, three years after the alleged right of translation had been lost by the lapse of the five years: arts. 6, 14; but, even supposing the *Berne* Convention does apply, the right has been lost, under art. 5, through "the expiration of ten years from the publication of the original work." This "publication" took place in *Paris* on the 30th of August, 1879, so that the ten years expired on the 30th of August, 1889, and thereupon the work fell "into the public domain in the country of origin": art. 14. Then, under art. 9, it is only "during the existence of their exclusive right of translation" that dramatic authors are protected against the unauthorized public representation of their works.

Secondly, I say that the Plaintiff has no title to sue. The registration on the 27th of February, 1892, of the assignment by the three brothers, *Hanlon-Lees*, purported to be under sect. 13 of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), which provides for the registration of an assignment of copyright from the "registered proprietor." Now, these three brothers were not the "registered proprietors," for, under the registration in 1879, there was a fourth brother, *Frederick*, also a "registered proprietor." The three surviving brothers have never been registered as the proprietors, and the representatives of *Frederick* do not appear at all; no title has, therefore, been shewn from the four registered proprietors to the three survivors. This should have been done, for the ownership of a copyright in several persons is not a joint tenancy, but a tenancy in common: *Powell* v. *Head* (2). Again, in the *Pettitt* registration of the 10th of August, 1881, five brothers, including *Frederick* and *Alfred*, were

(1) Law Rep. 10 Eq. 193, 205. (2) 12 Ch. D. 686.

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registered; but the shares of *Frederick* and *Alfred* have not been accounted for. Neither has the share of *Agoust*, who was one of the parties to the document of the 22nd of May, 1880, been accounted for. Upon either ground, therefore—namely, either the lapse of the right of translation, or the absence of title to sue—the Plaintiff must fail.

Cutler, Q.C., and *Megone*, for the Defendant *Mulholland*:—

Whatever the rights of *Renad Frères* may be, we acted in good faith. The evidence shews that, whatever was done by *Renad Frères*, was done with the privity of *Blum* and *Toché*, and that our adaptation was made from their French original, and quite independently of any English translation or adaptation owned by the Plaintiff.

The *Berne* Convention conferred rights on such authors only as were citizens of one of the countries of the union, and the Plaintiff has not proved that *Blum* and *Toché* were Frenchmen.

There is no reason why, in art. 14, the word "work" should be confined to the whole work of the author. In other places in the *Berne* Convention the word is used in reference to a part of the copyright. Adaptation is distinct from translation. The Convention recognises a translation as an original work.

A person who makes alterations so extensive as those made in the present case cannot be a joint author; still less can his work be the subject of a separate copyright: *Levy* v. *Rutley* (1); *Chatterton* v. *Cave* (2).

The two agreements with *Blum* and *Toché*, and the whole course of dealings, shew that it was never intended that anything should pass except the right to perform the original French play, "*Le Voyage en Suisse*." The agreement of the 11th of March, 1879, never contemplated even the existence of foreign translations or adaptations. The document of the 22nd of May, 1880, was really intended to be acted on in *England*, and it must, therefore, be construed according to English law: *Chatenay* v. *Brazilian Submarine Telegraph Company* (3). So construed, it did not operate as an assignment of the copyright. What we did was perfectly justifiable.

(1) Law Rep. 6 C. P. 523. (2) Law Rep. 10 C. P. 572. (3) [1891] 1 Q. B. 79.

Warmington, in reply:—

The object of the *Berne* Convention was to give, not to particular citizens, but to an "author" who first published a work in one of the countries of the union, copyright in such work throughout the other countries. It has nothing to do with citizenship. There are three rights in question—viz., copyright, right of representation, and right of translation. The origin of the play is French, the author (if it be material, which I say it is not) was a French citizen, and the play was produced in *France*. The Plaintiff is in the same position as the author, having obtained an assignment from three out of the four *Hanlon-Lees*: *Powell* v. *Head* (1); and as part-owners we are entitled to sue in trespass to prevent a stranger interfering with our rights. If an authorized translation is brought over to this country, there is nothing in sect. 4 of the Act of 1886 to limit the duration of the copyright. That Act is to be read together with the Convention. Unless within ten years a proper translation is produced the right to protection in the *United Kingdom* against unauthorized translations is gone; but if that requirement is complied with, the right endures during the whole term of copyright. If a person in *France* produces a work for the first time, it will have protection in *England* for his life and seven years afterwards, and therefore, in clause 3 of the Order in Council, the rights of translation and representation are referred to as included in copyright. It matters not in what country the work is produced if it is in fact produced in one of the countries of the union. Art. 5 of the Convention and sect. 5 of the Act must be read together, otherwise the absurd result would follow—that a person entitled to the copyright of a play would not be enabled, after the expiration of the ten years, notwithstanding the effect of art. 3, to restrain the translation of the work or the performance in *England*, and yet he is to have the same rights as if the play were produced in this country. Sect 6. of the Act, which is to be read with art. 6 of the Convention, is my root of title.

[He referred also to *Moul* v. *Groenings* (2).]

(1) 12 Ch. D. 686. (2) [1891] 2 Q. B. 443.

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KEKEWICH, J.:—

The difficulty of this case is to be found in the complication of the statutory enactments which deserved and have received criticism, including, of course, in the expression "statutory enactments," though not strictly so called, the *Berne* Convention and the Order in Council. I do not propose to deal with all the arguments which were addressed to me; some of them may require further consideration at a future time; but there is no occasion, in my opinion, to go into them all in detail now. At present it must not be assumed that, because I omit some of the arguments, they have not been considered. On the other hand, many of them, I think, will not require consideration, as being either immaterial or unimportant. Amongst those, I think, is the argument which Mr. *Cutler* addressed to me, that there is no proof here respecting the nationality of the author of this work. I fail to see the importance of that, there being no specific mention of the nationality in the *Berne* Convention or the Order in Council which gives effect to it in this country.

The argument of Mr. *Scrutton* on behalf of the principal Defendants, Messrs. *Renad Frères*, which was terse and critical, made substantially three points, and with those three points only I think it necessary to deal. One point was that the Plaintiff has no title to sue because he has not an assignment, either by deed or by registration, from the original owners. In other words, his pedigree is not proved; or, to take the analogy from another branch of the law, his descent or grant is not proved. That depends upon this: he claims through all the *Hanlon-Lees*—the whole body of them—but he has an assignment from three of them only. I leave out of consideration the other party, *Agoust*, because, although he seems to have had some interest, his name never appears on the register, and I think he may, therefore, fairly be left out of consideration altogether: it does not appear what his interest really was. One of the *Hanlon-Lees*, *Frederick*, died, and there is no assignment to the Plaintiff, either by deed or by registration completing an assignment by deed, of *Frederick's* interest. The title might, nevertheless, be good if there was a joint tenancy, in which case the right would survive to the others. But it is not a joint tenancy:

that has been finally decided, I think, once for all in the case of *Powell* v. *Head* (1), before Sir *George Jessel*, and it must be considered as now settled law. Registered owners of a copyright are tenants in common, and they are tenants in common of a peculiar kind. It is impossible for us English lawyers, dealing with the English language, to express our views except in the technical language of our law; but it is not, perhaps, accurate even to call such owners tenants in common, and the Master of the Rolls took care not to call them simply tenants in common: he calls them "tenants in common or part owners," and there are, or may be, many differences and distinctions between tenants in common and part owners, as regards their rights *inter se*, and in respect of strangers. He not only decided that, but he also expressed a strong opinion (2), "that one part-owner could not either lend or deal with the entirety of the property without the authority of the other part-owner." And, again, on the same page of the report, he says: "Therefore, they" (the two assignees) "were strictly tenants in common or part-owners of the right of representation, or liberty of representing, as it is called. That right, I take it, could not be exercised by one of them, that is, could not be exercised by one of them in the sense, that one could give the right of representation to a third party." That means to confer the sole right of representation, to pass it on as the property of the third party, which he might maintain against all the world, including the part-owner who had not concurred in the assignment or donation.

That, at first sight, seems to be a blot on the Plaintiff's title; but Mr. *Warmington's* answer to it is, I think, sound. He says: "We may not have the complete title to the whole property; but we are, as part owners, entitled to, at any rate, the three-fourths, taking the assignment as being that of three out of four (and the argument is equally applicable if there were two out of four, or one out of four, or the same number out of five or more), in that character we are entitled to sue in trespass to prevent a stranger interfering with our rights—the rights which belong to us, it may be in common with others—for which we may be accountable to others, and which may be possibly to some extent

(1) 12 Ch. D. 686. (2) 12 Ch. D. 689.

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defeated if that stranger can set up a title through others. But so long as we are suing a stranger, so long as we are preventing interference with that of which we are part owners, we are right and can maintain our action."

That argument proceeds strictly on the analogy of the law from which tenancies in common and part-ownership came, and I think it would be departing from an analogy which is perhaps more strictly applicable than analogies often are, to say that the Plaintiff fails on that ground. So far, therefore, I do not think the objection to the Plaintiff's motion prevails.

Then comes another objection, which is, that *Hollingshead's* translation was not really a translation; and as proof of that I was referred to what the Plaintiff himself has proved—a list of omissions and additions which I have before me. They are certainly considerable. I know not how many lines, or, to use the legal term, how many folios the original, or the original translation, consists of; but I find in the present version or adaptation omissions of at least several lines in each act, besides other omissions the extent of which it is quite impossible for me to estimate correctly without an accurate examination of the work with the original. Then there are also considerable additions in different parts of the so-called translation. I confess to being struck by the number of these omissions and additions, conceiving it at least possible that they might entirely alter the character of the play; but I have no evidence on that point at all. The Defendants, however, have put in an affidavit by a gentleman, stating that he has carefully compared the so-called translation with the manuscript of the French piece in the hands of the Defendants, and that the same is substantially a translation. If, then, this is a translation, that is all that is required. If the Defendants fail on that ground, it is because they have not only not given me the evidence on which I could criticise the totality of the work, but because they have actually given evidence which shews that I ought not to do so. I therefore hold, quite conformably to *Wood* v. *Chart* (1), that, for the present purpose, there is nothing to interfere with the Plaintiff's title on that ground. Vice-Chancellor *James*, in *Wood* v. *Chart*, held that

(1) Law Rep. 10 Eq. 193.

a translation, for the purpose of protection, must be one of this character. He says (1): "What is required is, that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English." He takes care to say that the difference of a few words would not prevent its being a translation, but it must be done as exactly as possible. When one of the Defendants' witnesses tells me that, on careful examination, this is substantially a translation, I suppose he means, and must mean, that it does translate this work as accurately as, according to his view, is reasonably possible. Again, I am in favour of the Plaintiff on that ground.

So far I really have avoided the difficulties which occur under the Act of Parliament, the *Berne* Convention, and the Order in Council, and I shall deal with them even now somewhat lightly. There are considerable puzzles about them. The difficulties arise on sect. 5 of the *International Copyright Act*, 1886, the Order in Council adopting the *Berne* Convention, which Order was made on the 28th of November, 1887, and came into operation on the 6th of December, 1886, and the *Berne* Convention itself, which is dated the 5th of September, 1887.

Turning to the *International Copyright Act*, 1886, sect. 3 refers to the right of copyright—that is to say, to original works. Sect. 5 gives to an authorized translation (which, I ought to have said before, *Hollingshead's* translation certainly is) the same rights as an original work; so that, if there were no more, we should have here a work claiming such rights as are known as copyright rights by means of that Act of Parliament coupled with the *Berne* Convention. But there is a proviso in sect. 5 that the copyright extended to a translation shall not be so extended unless there is an authorized translation within the period of ten years. That, I think, is the meaning of the proviso; and in this case, there having been an authorized translation within the ten years, it seems to me that sub-sect. 1 of sect. 5 applies, and applies by reference to sect. 3 of the Order in Council, notwithstanding art. 5 of the *Berne* Convention, which limits the period of ten years from the date of first publication in

(1) Law Rep. 10 Eq. 205.

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the foreign country. So that, in the present case, notwithstanding that the ten years expired in 1889, and notwithstanding that if at that time the right of translation was gone, and the right of performing it had fallen into the public domain, and the Convention was not applicable, still, I think, on the proper construction of these statutes, the right is given to those through whom the Plaintiff claims. That construction is partly dependent, no doubt, on sect. 6 of the *International Copyright Act*, 1886, which makes the Order in Council of 1887 so retrospective that it enables rights which might have been previously acquired if the *Berne* Convention and the Order in Council had then been in existence, to be acquired as on the footing of the Convention and Order having been then in existence.

But, giving full force to the 6th section—that is to say, the full retrospective effect which is claimed for it —and construing sects. 3 and 5 of the Act and art. 5 of the *Berne* Convention together in the way that I have done, still I cannot see that the 6th section can set up a title which had gone. I cannot see that there are any words in the 6th section or elsewhere which amount to this, that, notwithstanding that an author's right in a translation has ceased or lapsed, yet he shall acquire that right *de novo*. If, therefore, I could find that any period fixed by the Convention during which protection is to be extended had expired, then the 6th section would not protect the Plaintiff.

Now it seems to me that there is one period which had expired at the time the Act, the Order in Council, and the *Berne* Convention came into operation, and that is why I mentioned the several dates. The right of translation—that is to say, the protection of the translation—was given by the *International Copyright Act*, 1852 (15 & 16 Vict. c. 12), ss. 1 to 4. By those sections the protection was extended only for five years—applying the language to this case—after the registration, in the name of *Hollingshead*, of the right to perform, or liberty to perform, the English version. That registration was on the 27th of November, 1879. The five years expired on the 27th of November, 1884. At that time there was no such Act, no such Convention, no such Order in Council as I have before mentioned. The particular sections to which I have referred of the Act of 1852 were re-

pealed by sect. 12 of the very Act, that of 1886, which gives these new rights, and I do not find in this latter Act anything which says, either expressly or in effect, or in any way approaching implication, that what was then gone should be set up by that repeal; and, according to the general principles by which statutes are to be construed, one would require express words to confer such a right. It seems to me, therefore, that at the time when the Act of 1886, the Order in Council, and the *Berne* Convention came into operation, the period of five years had expired, and the right to translate, which, of course, one assumes to have been in existence (I am not discussing that), had gone, and therefore there was nothing on which the Act, Order in Council, or Convention could operate. As far as this translation was concerned, therefore, they do not operate to protect the Plaintiff.

On that ground, and on that ground only, I think the Plaintiff's case fails, and therefore the motion must be refused; but there are too many points in this case deserving of serious consideration to make me think it right to visit the Plaintiff with the costs of this motion: because there may be, after all, some rights which may be substantiated at the trial, and as to which he may maintain his right of action. I therefore think the proper course will be to make the costs of the motion costs in the action.

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The Plaintiff appealed, and the appeal came on for hearing on the 26th of May, 1892.

Warmington, Q.C., and *Swinfen Eady*, for the Appellant:—

By virtue of the assignments which have been made the Plaintiff has succeeded to the rights of the brothers *Hanlon-Lees* and of *Hollingshead*. The Defendants object that the Plaintiff is only entitled to the interest of three of the four brothers *Hanlon-Lees*; but, if it be so, he has still sufficient interest to maintain the action: *Powell* v. *Head* (1). The rights of the Plaintiff must be determined by the *International Copyright Act*, 1886 (49 & 50 Vict. c. 33), and the *Berne* Convention and Order in Council of

(1) 12 Ch. D. 686.

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1887 (1). The 6th section of the Act of 1886 is retrospective in its operation. The object of that section and of sect. 3 of the Order in Council was to extend the right of copyright and to put works produced before the Convention on the same footing as those produced afterwards. Therefore, if the Plaintiff's exclusive right of translation had lapsed before the passing of the Act of 1886, it was revived by that Act, and had not expired when this action was commenced: *Moul* v. *Groenings* (2).

(1) The principal clauses in those documents which were referred to in the argument were the following:—

49 & 50 Vict. c. 33, s. 6: "Where an Order in Council is made under the *International Copyright Acts* with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said Order had applied to the said foreign country at the date of the said production. Provided that where any person has before the date of the publication of an Order in Council lawfully produced any work in the *United Kingdom*, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such production which are subsisting and valuable at the said date."

Berne Convention, 1887, art. 5: "Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries exclusive rights of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the union."

Art. 14: "Under the reserves and conditions to be determined by common agreement, the present Convention applies to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin."

Order in Council, Dec. 2, 1887, sect. 3: "The author of a literary or artistic work which, on or after the commencement of this Order is first produced in one of the foreign countries of the Copyright Union shall, subject as in this Order and in the *International Copyright Acts*, 1844 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions the same right of copyright, including any right capable of being conferred by an Order in Council under sect. 2 or sect. 5 of the *International Copyright Act*, 1844, or under any other enactment, as if the work had been first produced in the *United Kingdom*, and shall have such right during the same period. Provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein, than that which he enjoys in the country in which the work is first produced. The author of any literary or artistic work first produced before the commencement of this order shall have the rights and remedies to which he is entitled under sect. 6 of the *International Copyright Act*, 1886."

The full text of the *Berne* Convention and the Order in Council are given in *Scrutton* on Copyright, 2nd Ed. pp. 255, 257.

(2) [1891] 2 Q. B. 443.

Scrutton, and *H. Hulse*, for the Defendants *Renad Frères*:—

The Plaintiff only represents the rights of three of the brothers *Hanlon-Lees*, and cannot sustain this action in the absence of a representative of the other brothers. The Act of 1886 and the *Berne* Convention and Order in Council have no application to this case, because the right of restraining translations had lapsed before the commencement of the Act, the five years allowed by the *International Copyright Act*, 1852 (15 & 16 Vict. c. 12), sect. 4, having expired in 1884. The 6th section of the Act of 1886 could not have the effect of reviving a lapsed right; it would require very distinct words to do that. We also contend that the translation of *Hollingshead* which was registered was not strictly a translation, and for that reason is not protected: *Wood* v. *Chart* (1). Nor is the play which the Defendants are exhibiting a mere translation; it has much original matter and new tricks and incidents.

Cutler, Q.C., and *Megone*, for *Mulholland* (after referring to *Burnett* v. *Chetwood* (2) and *Murray* v. *Bogue* (3)):—

There is nothing to shew that either of the parties belonged to a country which was a party to the *Berne* Convention. By sect. 4 of the Order in Council the author of a literary or artistic work produced in one of the foreign countries of the Copyright Union cannot sue here unless he is a subject or citizen of one of those countries. It is on the Plaintiff to make out his title to sue, and he has not shewn that he is a subject or citizen of any of them. In art. 2 of the *Berne* Convention regard must be had to the original French in construing the words "authors of any of the countries." The Plaintiff, therefore, has not yet established that he is a proper Plaintiff.

Warmington, in reply.

1892. June 3. LINDLEY, L.J.:—

This is an appeal by the Plaintiff from a refusal by Mr. Justice *Kekewich* to grant an injunction to restrain the performance of a

(1) Law Rep. 10 Eq. 193. (2) 2 Mer. 441.
(3) 1 Drew. 353.

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play or pantomime known as "*The Voyage in Switzerland*" or "*The Swiss Express.*" The right to the injunction asked is based on the *International Copyright Act*, 1886, and the Convention known as the *Berne* Convention, and the Order in Council of December, 1887, bringing it into force in this country; and, before further alluding to these documents it is necessary to understand the facts to which they have to be applied. [His Lordship then stated the facts, and continued:—]

Considering the time which has elapsed since the Defendants first began to perform this play, and the arrangements they have made for performing it in future, it would not, under any circumstances, be right to interfere in favour of the Plaintiff so as to disturb those arrangements. But the Defendants' counsel was not prepared to give any undertaking binding MM. *Renad* not to continue their performances under fresh arrangements, and the Defendants deny the existence of any copyright in the Plaintiff. Under these circumstances it becomes necessary to examine his rights.

The Defendants rely on several grounds of defence; but the only one which I propose to consider is the defence based on the expiration of all copyright before the passing of the Act of 1886, and the non-creation of any new right by that Act.

Assuming everything in the Plaintiff's favour, the dramatic copyright acquired in 1879 by the *Hanlon-Lees* expired in November, 1884, *i.e.*, five years after the registration of *Hollingshead's* translation in November, 1879. This is plain if the *Copyright Acts* which were in force between 1879 and 1886 are examined. These are the *International Copyright Acts*, 1844 and 1852, 7 & 8 Vict. c. 12, and 15 & 16 Vict. c. 12.

[The Lord Justice then referred to sects. 5, 6, 18, and 19 of the Act 7 & 8 Vict. c. 12; and to sects. 4, 5, and 8 of the Act 15 & 16 Vict. c. 12, and then continued:—]

Under sect. 4 of the Act of 1852 the right acquired by the *Hanlon-Lees* to prevent representations of the play in question came to an end in 1884.

It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an

expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. The *International Copyright Act* of 1886 must be construed according to these well-settled rules. The section which alone can avail the Plaintiff is sect. 6.

[The Lord Justice then read that section.]

It would in my opinion be a direct violation of the rules to which I have referred if this section were construed so as to revive or recreate a right which had expired before the Act passed or so as to confer a new right on the former owner of an expired right without any fresh act done by him.

The *International Copyright Act*, 1886, and the *Berne* Convention, and the Order in Council giving effect to it, must be read together. The clauses regulating the retrospective operation of these instruments are: (1.) Article 14 of the Convention, (2.) clause 3 of the Order, and (3.) sect. 6 of the Act. The Defendants are not infringing any copyright in the French play as distinguished from the English translation of it.

It is not necessary in this case to consider the exact extent to which in all cases sect. 6 is retrospective, nor to decide whether it does or does not apply to translations published before the passing of the Act and the copyright in which had not then expired. We have only to deal with a translation the copyright in which had expired before the Act came into force, and to that I confine my opinion.

On the broad ground that sect. 6 of the Act does not revive expired copyrights, which is the ground on which Mr. Justice *Kekewich* proceeded, I am of opinion that the Plaintiff has no such rights as he asserts; and the appeal must be dismissed with costs.

BOWEN, L.J.:—

I concur.

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KAY, L.J. (after stating the facts, continued):—

The Defendants have made a new translation from the French drama, and it is sought to restrain the representation of this. Under the *Copyright Acts* then in force, 7 & 8 Vict. c. 12, and 15 & 16 Vict. c. 12, the rights given by the first translation in *England* expired at the end of five years from the time of such translation, that is, on the 27th of November, 1884. After that date any one had the right in *England* to make a translation from the French original drama, and to have such translation performed in *England*.

On the 25th of June, 1886, an Act was passed to amend the existing *International Copyright Acts*, which was called the *International Copyright Act*, 1886. It is argued that this statute revived in *England* the rights which under the former Acts had expired, and gave to the foreign author or his assigns a new right in the nature of copyright in this country notwithstanding the expiring of such rights as he had under the former Acts, certain portions only of which are by this Act repealed.

Sect. 5 of the Act of 1886 relates to the right of a foreign author to prevent any translation being produced or imported into the *United Kingdom*, and gives him the same right in respect of such a translation "as he has of preventing the production and importation of the original work." It provides that this right shall cease if, ten years after the dramatic piece was first produced, there has not been produced an authorized English translation, and that the law relating to copyright, including that Act, shall apply to an authorized translation.

There is nothing retrospective in the language of that section, and the maxim "*Nova constitutio futuris formam imponere debet non præteritis*" forbids us to place a construction upon it which would make it applicable to a work published before the statute.

But reliance is placed on sect. 6, which contains words which certainly have some retrospective meaning and operation. It begins: "Where an Order in Council is made under the *International Copyright Acts* with respect to any foreign country" (which may mean "shall hereafter be made," or may, if the context requires it, possibly mean "has been, or shall be made")

the author of any work "first produced before the date at which such Order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said Order had applied to the said foreign country at the date of the said production." The said Acts there mentioned are the previous *International Copyright Acts*, which are only partially repealed by this Act, and with which, by sect. 1, sub-sect. 3, this Act is to be construed. That certainly includes a case where, at the date of the production of the work, this Act and the former Acts would not apply to the foreign country. Such a case would arise where, after the passing of this Act, an Order in Council was made admitting a foreign country for the first time to the benefit of the *International Copyright Acts*. Then comes this proviso: "Provided that where any person has before the date of the publication of an Order in Council lawfully produced any work in the *United Kingdom*, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such production which are subsisting and valuable at the said date."

It is contended on the one side that this proviso shews that an expired right of preventing translations in *England* was intended to be revived and enlarged, because the position of an actual translator after the right expired is by these words preserved. On the other hand, it is argued that these words only apply where a translation is produced in the *United Kingdom* between the passing of the Act of 1886 and the publication of a subsequent Order in Council admitting the foreign country in which the drama was first published to the benefits conferred by this statute.

I think that as to translations this is the better construction. The *Berne* Convention referred to in this statute, which governs the rights of French authors, carefully excludes the case of a drama the right to translate which had passed into the public domain. In this case I think the right had become public, within the meaning of that Convention, on the 27th of November, 1884, that is, five years after the first translation into English. I cannot think that the true construction of this Act of 1886 is to take away from the public the right which they had as to

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this drama published in 1879 under the legislation which existed prior to 1886.

The appeal must be dismissed with costs.

Solicitors: *Stanley, Woodhouse, & Hedderwick; Thomas & Hick.*

W. W. K.

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[1890 L. 2713.]

Patent—Validity—Disconformity between Provisional Specification and Complete Specification—Nature of Invention—Distinction between Patentable and Non-patentable Inventions—Patents, Designs, and Trade Marks Act, 1883 (46 *&* 47 *Vict. c.* 57) *ss.* 5 *sub-s.* 3, 26.

The Plaintiff, an electrician, took out, in 1878, a patent for "Improvements in obtaining light by Electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or appliances employed therein." He subsequently disclaimed his claims in respect of measuring, conveying, distributing, and regulating by means of the electrometer, and only claimed in respect of an invention for keeping the electro-motive force of the electric current in the mains constant by means of the employment of *Planté's* secondary batteries, in combination with dynamos, and in conjunction with a regulator.

In an action by the Plaintiff for infringement of his patent, it was *held*, by *A. L. Smith*, J., that the patent was bad, because (1.) the Plaintiff's complete specification, as amended, did not describe the same invention as his provisional specification, (2.) the invention as described could not be made to work, and (3.) no sufficient information was given by the Plaintiff as to how it was to be made to work; but that if the Plaintiff had not failed in these respects the invention would have been good subject-matter for a patent, and had not been anticipated; and there would have been infringement by the Defendants:—

Upon appeal, it was *held* by the Court, in affirming the judgment of *A. L. Smith*, J., that the Plaintiff's invention was novel; but that his patent, as amended, was invalid upon the grounds (1.) that the original patent was granted for an invention different from that for which he claimed protection after the disclaimers, (2.) that it was not, in 1878, useful for the main purpose for which it was designated, viz., the practical lighting of large districts, and (3.) that the specification was insufficient to enable an electrician, of ordinary competence and skill in 1878, to carry it out without further experiments and invention.

Per Lindley, L.J.:—An invention is not the same thing as a discovery; and if a man does nothing more than discover that a known machine can

produce effects which no one before him knew could be produced by it, his discovery, however great and useful, is not a patentable invention.

To entitle a patentee to maintain his patent, he must make some addition not only to knowledge but to previously known inventions; and must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result.

The discovery that a known thing can be employed for a useful purpose for which it has never before been used is not alone a patentable invention; but the discovery how to use such a thing for such a purpose will be a patentable invention if there is novelty in the mode of using it as distinguished from novelty of purpose; or if any new modification of the thing, or any new appliance, is necessary for using it for its new purpose, and if such mode of user, or modification, or appliance involves any appreciable merit.

THIS was an appeal by the Plaintiff, from the decision of Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer* (1), where the facts of the case and the arguments on either side are fully reported.

A cross notice of appeal was given by the Defendants.

Mr. *St. George Lane Fox*, the Appellant, in person, contended (*inter alia*) that in cases of alleged unworkability, it was usual to produce evidence of an attempt to work according to the specification which had resulted in failure; but that no such evidence had been produced with regard to his system.

He also contended that the fact that an invention is used for a purpose different from that for which it was used by the inventor does not prevent that use from being an infringement: *Edison and Swan Electric Light Company* v. *Holland* (2), *Thomson* v. *Batty* (3).

He referred also to *Nuttall* v. *Hargreaves* (4), and, with reference to the principles applicable to questions as to the utility of an invention, he cited *Plimpton* v. *Malcolmson* (5).

R. W. Wallace (with whom were Sir *H. Davey*, Q.C., and *Finlay*, Q.C.) was only called upon to address the Court upon the question whether the invention as patented would work; and did so accordingly.

(1) [1892] 2 Ch. 66.
(2) 5 Rep. Pat. Cas. 459, 482. 6 Rep. Pat. Cas. 84, 99.
(4) 8 Rep. Pat. Cas. 450; [1892] 1 Ch. 23.
(5) 3 Ch. D. 531, 582.

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Mr. *Lane Fox*, was heard in reply.

In other respects, the arguments were either substantially the same as those already reported in the Court below, or were of a character too technical for the purposes of this report.

1892. Aug. 10. LINDLEY, L.J.:—

This is an appeal by the Plaintiff against a judgment of Lord Justice *A. L. Smith*, dismissing an action brought for the infringement by the Defendants of a patent belonging to the Plaintiff. As usual in such cases, the Defendants denied the infringement, and denied the validity of the Plaintiff's patent, on the ordinary grounds of want of subject-matter, want of novelty, want of utility, insufficiency of the specification, and, in addition to these, the Defendants contended that the nature of the invention, as described in the provisional specification, was not the same as that described in the complete specification, at any rate after it had been amended and put into its present form. Lord Justice *A. L. Smith* decided in the Defendants' favour on the last point; but he also came to the conclusion that the invention, as described, could not be usefully worked; and that the directions to work it were insufficient. He, however, decided the other points in favour of the Plaintiff, and held that, if the patent had been valid, the Defendants would have infringed it.

A cross notice of appeal was given by the Defendants, and the whole case was argued at great length before this Court by Mr. *Lane Fox* in person, on the one side, and by Mr. *Wallace*, as counsel for the Defendants, on the other. The Court was supplied with a printed copy of the shorthand writer's notes of the evidence taken in the Court below, of the arguments of counsel on the trial of the action, and of the judgment of the learned Judge. All these I have carefully read and studied since the argument in this Court was closed.

The Plaintiff's patent, as described in his original specification, was for "improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or appliances employed therein." The provisional specification was filed on the 9th of

October, 1878, and the complete specification was filed on the 9th of April, 1879. Owing to subsequent disclaimers and amendments, which it will be necessary to examine more carefully by-and-by, the only part of the patent which has to be considered is that relating to the distribution and regulation of electric currents for purposes of lighting.

In order to understand the nature of the Plaintiff's invention, and the objections taken to the validity of his patent, it is necessary to ascertain what was the state of knowledge as regards electric lighting in 1878. This is by no means an easy matter, for since that time much has been learned, vast improvements have been made, and the progress has been so fast, and yet so gradual and continuous, that there is great danger of supposing that what is plain and well known now was plain and well known then.

The evidence given in the case shews that the following matters were well known in 1878:—First, that electricity could be used for lighting purposes; second, that the arc or brush light was known and in course of being perfected; third, that incandescent lighting was foreseen as possible and probable, and that many persons were trying to discover how to effect it; fourth, that electric generators, and what are now called dynamos, were well known; fifth, that *Planté's* secondary batteries, capable of being charged by an electric current, and of storing electricity (*i.e.*, of remaining inert, and of giving electricity out when wanted), were well known and had been used for arc lighting; sixth, that the voltage of the electric current given off by such batteries could be increased or diminished by adding or removing cells; seventh, that in order to obtain and maintain an electric current a complete conducting circuit was necessary; eighth, that for currents of low tension the earth itself might be used for a return conductor; ninth, that "earth," or "an earth," was a technical expression used to denote any suitable return conductor; and, tenth, that any competent electrician would know that, if in any particular case he could not use the earth itself as a return conductor, some other return conductor would have to be provided.

On the other hand, the evidence shews that in 1878 it was not

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known how to construct an incandescent electric lamp for any generally useful purpose. It was not known to be important for the purpose of lighting with such lamps that the current supplying them should be kept at a constant pressure of about 100 volts; nor was it known that good results for incandescent electric lighting could be obtained by using secondary batteries, such as *Planté's*, in conjunction with dynamos. Further, in 1878 dynamos did not work so smoothly as they do now, and some better method of regulating the action of the engines used to drive them was necessary, or at least desirable. Lastly, it was not known that, for lighting large districts with incandescent lamps with electrical currents of high tension, the earth could not be used as a return conductor.

Such being the state of knowledge in 1878, the Plaintiff claims by his patent to have done three things which were new and useful—viz. (1.), he claims to have invented a lamp which would answer the purpose; (2.), he claims to have invented a method of keeping the electro-motive power of the current in the mains constant at about 100 volts; (3.), he claims to have invented a method of better regulating the engines which drive the dynamos. The lamp has been since replaced by cheaper and better ones and has been disclaimed. The regulator has become unnecessary by reason of improvements in engines and dynamos, and has been disclaimed, but it was a very important part of the Plaintiff's original invention.

There remains the invention for keeping the electro-motive force of the current in the mains constant.

This invention is the one which has to be considered in this action. An invention is not the same thing as a discovery. When *Volta* discovered the effect of an electric current from his battery on a frog's leg he made a great discovery, but no patentable invention. Again, a man who discovers that a known machine can produce effects which no one before him knew could be produced by it, may make a great and useful discovery; but, if he does no more, his discovery is not a patentable invention: *Britain* v. *Hirsch* (1); *Harwood* v. *Great Northern Railway Company* (2); *Horton* v. *Mabon* (3); *Saxby* v. *Gloucester Waggon Com-*

(1) 5 Rep. Pat. Cas. 226, 232. (2) 11 H. L. C. 654. (3) 12 C. B. (N.S.) 437.

pany (1). He has added nothing but knowledge to what previously existed. A patentee must do something more; he must make some addition, not only to knowledge, but to previously known inventions, and must so use his knowledge and ingenuity as to produce either a new and useful thing or result, or a new and useful method of producing an old thing or result.

On the one hand, the discovery that a known thing—such, for example, as a *Planté* battery—can be employed for a useful purpose for which it has never been used before is not alone a patentable invention; but, on the other hand, the discovery how to use such a thing for such a purpose will be a patentable invention if there is novelty in the mode of using it, as distinguished from novelty of purpose, or if any new modification of the thing, or any new appliance is necessary for using it for its new purpose, and if such mode of user, or modification, or appliance involves any appreciable merit. It is often extremely difficult to draw the line between patentable inventions and non-patentable discoveries, but I have endeavoured to state the distinction as I understand it, and so far as is necessary for the purposes of the present case. I have, of course, been guided by the previous decisions on the subject, and especially by *Harwood* v. *Great Northern Railway Company* (2), which is the most instructive of them all.

I have been induced to make these observations in order to apply them to the question, whether the Plaintiff's invention is anything more than a discovery that *Planté's* cells can be usefully employed for incandescent lighting. If it is not, his invention will not be the subject-matter of a patent. What, then, is the nature of his invention as described in his original specifications? It certainly is not for the mere use of *Planté* batteries in connection with dynamos. It is for the use of them as described, which is a very different matter. [The Lord Justice then read the material portions of the provisional and complete specifications, and continued:—] I cannot read these specifications without coming to the conclusion that the Plaintiff thought he had discovered how to overcome one of the greatest difficulties in incandescent lighting. He points out that the electro-motive

(1) 7 Q. B. D. 305. (2) 11 H. L. C. 654.

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force of the electric conducting mains should be kept constant at about 100 volts by means of dynamos and secondary batteries, used as described at various places, and in conjunction with the regulator, which, he says, is necessary. That is his discovery and the nature of his invention, as stated by himself. It is not put in this simple form; it is mixed up with the mode of carrying the invention out. The Plaintiff not merely discovered that *Planté's* secondary batteries could be usefully employed for incandescent lighting, but he shewed the importance of keeping the electro-motive force in the mains constant at the best voltage; and he claims to have shewn how, practically, the desired result could be obtained, which no one knew before. As regards the nature of the invention as originally described, and as regards its being the proper subject-matter for a patent, my decision is in favour of the patentee, provided always that his invention proves practicable. This accords with the view taken by Lord Justice *A. L. Smith.*

But this view of the Plaintiff's invention is of no use to the Plaintiff; for neither the Defendants nor any one else use this invention as it was originally described. The Plaintiff now claims something very different, *viz.*, the use of secondary batteries in conjunction with dynamos for the purpose of keeping the electro-motive force constant in the mains at about 100 volts. Lord Justice *A. L. Smith* held this to be an invention very different from that originally described, and he also held that if this was the Plaintiff's invention it would not work without modifications and precautions which the Plaintiff never pointed out. I agree with him on both points, and I will take the last first. It is, I think, clear that no one had ever shewn or professed to shew how to produce this desired effect before 1878. Many prior patents were referred to by the counsel for the Defendants to shew want of novelty in the Plaintiff's invention, but there is no trace in any of them of any method of keeping the electro-motive force in a main constant at any particular voltage, nor was that the object of any of them. I dismiss them all with that short observation.

I pass from the novelty to the utility of the alleged invention and to the sufficiency of the specification for carrying it out.

The utility of the alleged invention depends not on whether by following the directions in the complete specification all the results now necessary for commercial success can be obtained, but on whether by such directions the effects which the patentee professed to produce could be produced, and on the practical utility of those effects. Can it be said that the invention as described in the amended specification was in 1878 a practically useful addition to the then stock of inventions? To judge of utility the directions in the amended specification must be followed, and, if the result is that the object sought to be attained by the patentee can be attained and is practically useful at the time when the patent is granted, the test of utility is satisfied. Utility is often a question of degree, and always has reference to some object. Useful for what? is a question which must be always asked, and the answer must be, Useful for the purposes indicated by the patentee. See *per* Lord Chief Justice *Tindal* in *Cornish* v. *Keene* (1); *Edison and Swan Electric Light Company* v. *Holland* (2); *Badische Anilin und Soda Fabrik* v. *Levinstein* (3).

An invention may be useful as indicating the direction in which further progress is to be expected, and yet that same invention may be useless for any other purpose; useless that is, as an invention without further developments and improvements which have not occurred to the patentee. That is, in my opinion, the real truth with respect to the Plaintiff's invention as now claimed by him. He made a distinct and important step in advance. The Plaintiff was the pioneer; he shewed others the road to be followed, but he did not give the traveller the information necessary to enable him to travel on it. There were difficulties to be overcome which the patentee did not foresee, and against which he naturally made no provision. There is an enormous mass of conflicting evidence upon the possibility of obtaining practically useful results by following the directions contained in his specification. Much of the evidence adduced against the patentee merely goes to shew that by following the directions in the specification you cannot produce such good

(1) 1 Web. P. C. 507. (2) 6 Rep. Pat. Cas. 243.
(3) 12 App. Cas. 712, 719, 720.

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results as are produced by the Defendants. This, obviously, is wholly immaterial. But there is, besides, a great deal of evidence to shew that an electrician of ordinary skill could not have produced any useful result in 1878, if he simply followed the directions contained in the specification, as amended, with such variations only as an electrician of ordinary skill would have known how to make in 1878. So much more can be done now by a *Planté* battery than was suspected in 1878, that I have found the greatest difficulty in coming to a conclusion on this all-important question, and I much regret that we had not the assistance of an expert in electrical science. I have studied the whole evidence with all the care I can bestow upon it, and have come to the conclusion that the Plaintiff had not, in 1878, invented what he now says he had—viz., a practical method of keeping the electro-motive force in the mains constant at about 100 volts, by means of secondary batteries and dynamos used simultaneously as described.

The evidence adduced by the Plaintiff shews that something like his invention can be worked on a small scale, and to a limited extent, when it is not necessary to charge the mains so as to produce a high pressure when the lamps are connected with the main. Professor *Barrett's* evidence as to what he did in his own laboratory for six years shews this; and it must be borne in mind that for a time he used water pipes and the earth as a return conductor, and shewed them to be sufficient. But his voltage was low; his dynamo produced a current at a tension sufficient for his lamps, without the aid of secondary batteries, and he used his batteries as reservoirs rather than as regulators. Moreover, Professor *Barrett* did not produce these results earlier than six or seven years ago, when much more was known about what could be done with *Planté* batteries than was known in 1878. The other cases in which the Plaintiff endeavoured to prove that his invention had practically succeeded will be found to have involved considerable important departures from his invention as described. The installation for Lady *Conyers'* ball is the best case the Plaintiff has; but there the batteries were taken charged, which is a very important matter.

The Defendants have, in my opinion, succeeded in proving

that the lamps will be destroyed, if, whilst they are connected with the main, the batteries are charged at a sufficient voltage to work for any useful purpose. This objection to the patent goes to the root of the Plaintiff's alleged invention. The objection is said by the Plaintiff to be based upon the erroneous assumption that the batteries must be charged and emptied to an extreme extent. "Charging" and "discharging" are, no doubt, relative terms, to be understood within reasonable limits, and a workman, intelligent enough to seize the idea of the patentee, would perhaps know, in a general way, that the electro-motive force could be regulated and kept approximately constant without excessive charging or discharging, and the brightness or dimness of the lamps would be his guide. But, conceding this, I think it proved that high charging is necessary to keep the electro-motive force constant at anything like 100 volts; and, if such high charging is necessary, it is not disputed that the lamps will be destroyed if the batteries are charged when the lamps are on, unless precautions against this cause of failure are taken. None, however, are indicated in the specification. I think it proved that a small variation in pressure in the main will cause a current to go into, or come out of, the secondary battery for a very short time. But this is not enough for practical purposes. High charging being necessary, it is, in my opinion, proved that the Plaintiff's invention will not work without switches; and these are not mentioned in the specification.

Upon this point there is much conflicting evidence, attributable, in great part at all events, to the ambiguity of the term "switching." It was known, before *Planté* invented his secondary batteries, that the voltage of primary batteries could be increased or diminished by increasing or diminishing the number of cells. The mechanical means of doing this is called "switching," and *Planté* himself pointed out that the voltage of his secondary batteries could be increased or diminished by similar means. Regulation, to some extent, takes place without switches. It is admitted by the Defendants' own witnesses that the batteries have a steadying effect for a short time; that they act as regulators to some small extent; and Professor *Barrett* has produced satisfactory results in his laboratory with

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low voltage without switches. In Lady *Conyers'* case there were no switches, but there was no dynamo at work. On the other hand, the evidence convinces me, that, for practical lighting with an electro-motive force of about 100 volts, and with dynamos and batteries and lamps all in use, switching is essential, and that no ordinarily competent electrician would have known, in 1878, how to keep the electro-motive force in mains constant at about 100 volts, without further instructions than the Plaintiff gave him. The Plaintiff's claim to have invented, in 1878, a practically useful method of keeping the electro-motive force in the mains constant at about 100 volts whilst the dynamos are running and the batteries are being charged and the lamps are on, cannot, in my opinion, be sustained. This is the broad ground on which the patent, as amended, must be held invalid, and this was the ground on which Lord Justice *A. L. Smith* condemned it on its merits.

Having arrived at this conclusion, it is unnecessary to consider the objections taken to the specification on the ground that the directions about the earth were misleading; and that the direction that the cells of the batteries should have very large conducting plates was too indefinite.

I have hitherto made no allusion to the Plaintiff's regulator, but this was, in my opinion, an essential part of his original invention. He says in his original specifications that it is necessary. Necessary for what? The context shews that it was necessary to keep the electro-motive force in the mains constant. This was a mistake, and the regulator, and all that was said about it, has been disclaimed and struck out by amendment. But the effect of this is entirely to change the nature of the invention as described in 1878, and to enlarge it, which is not permissible. (See *In re Gaulard and Gibbs' Patent* (1).) In the original specification the Plaintiff drew a marked distinction between storing and regulating; the secondary batteries were for storing, the regulator was for regulating. It is true that storing involves of necessity a certain amount of regulation; but over and above such regulation as is necessarily incidental to storing, further regulation was said by the inventor in 1878 to be necessary for

(1) 6 Rep. Pat. Cas. 215.

his invention. Between 1878 and 1883 he discovered that the regulator was not wanted, and that everything could be done by secondary batteries, as used in 1883, by which time dynamos and switching had been greatly improved. He accordingly disclaimed the regulator. I am satisfied that the Plaintiff had no idea that he could do without the regulator when he obtained his patent. He learnt it afterwards; and by disclaiming the regulator and amending his specification in 1883, as he did, the Plaintiff essentially changed the nature of his invention for keeping the electro-motive force in the mains constant. The claim to the use of the batteries as reservoirs had a definite meaning in the original specification, but it has a different and much wider meaning in the specification as amended in 1883. The Plaintiff is now really claiming a patent for the mere use of *Planté's* batteries in conjunction with dynamos. Such a patent would not have been valid unless the patentee had done something more. He must have shewn how the two were to be successfully worked together. But, assuming that a patent for such an invention might have been obtained, the Plaintiff's patent was not granted for any such invention. The effect, therefore, of the disclaimer and amendment made in 1883 has been to destroy the validity of the Plaintiff's patent, if it ever could have been made to work. Upon this point again I agree with Lord Justice *A. L. Smith.*

It is needless to consider the question of infringement. I will only add that, if the Plaintiff's patent could be upheld as a patent for the use of secondary batteries in combination with dynamos, then the Defendants would obviously have infringed his patent. But unless his patent can be upheld to this extent, no infringement has taken place.

Convinced, as I am, that the Plaintiff made a great step in advance when he suggested the application of *Planté's* batteries, for the purposes of incandescent electric lighting, I feel bound to hold his patent invalid, on the ground that it was granted for an invention very different from that which he now claims to have protected, and on the ground that it was not in 1878 useful for the main purpose for which it was intended—viz., the practical lighting of large districts, and upon the ground that

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his specification was insufficient to enable an electrician of ordinary competence and skill in 1878 to carry it out without further experiments and invention, as distinguished from mere practice and increased dexterity and skill. The appeal, therefore, must be dismissed with costs, in the usual way.

LOPES, L.J.:—

I agree, and have nothing to add.

KAY, L.J.:—

This action is brought to restrain infringement of the Plaintiff's patent, and for an account of profits or damages.

The patent is dated 1878, and has been amended by two disclaimers in 1882 and 1883.

The case is one of some difficulty, and the difficulty arises in great measure from the fact that the patent relates to electric lighting by incandescence, and in 1878 no practical mode of doing this had been perfected. Mr. *Lane Fox* contemplated lamps in which the incandescent material was platinum or iridium, which was to be maintained at a luminous heat not in vacuo. The incandescent lamp now in use, in which the material is carbon enclosed in a glass bulb exhausted of air, was not brought into practical use until some years after Mr. *Edison's* patent in 1881.

The real object of this action is to claim the exclusive right to the use of what are called accumulators in the modern system of electric lighting. I understand that accumulators are, in fact, what were originally called secondary batteries. They were invented or improved by *Planté*, and, at the time of this patent, were known as *Planté* batteries. They are not batteries for the original generation of electricity, but, if I rightly understand the evidence, they are constructed of plates of lead partly immersed in dilute sulphuric acid, the alternate ones connected with the positive and negative poles of the battery, and in the circuit with a dynamo or other generator of an electric current. When electricity is, by the action of such generator passed through the battery, an alteration takes place in the lead plates by the

deposit upon their surfaces of peroxide of lead. When the generator ceases to act, if the circuit is continued, there is a re-solution of that peroxide, and the battery during that chemical process gives out a considerable quantity of electricity. Directly the generator ceases to act, however, the electro-motive force—called otherwise the voltage, or potential—lowers, at first rapidly, and then much more slowly, and the current is maintained at this lower voltage for a considerable period, varying, of course, with the size of the plates in the battery and the quantity in comparison of the charge.

All this was known before the Plaintiff's patent; and *Planté's* batteries are accurately mentioned in his provisional specification as "reservoirs" of electricity. The provisional specification does not indicate distinctly that they were intended in his combination to answer any other purpose.

The combination which he claims that the Defendants are infringing consisted of several elements: (1.) A number of incandescent lamps arranged, not in series, but what is very inartificially called "in parallel," *i.e.*, through each of which passes, not the whole current carried by the main wire, but a portion only drawn from the main wire by a small wire serving the lamp from which it is returned also by a separate return wire. (2.) The introduction into this system of several *Planté's* batteries joined in like manner to the main wire at different points, and each having a separate junction with the return.

The complete specification contains this sentence: "In order to keep the electro-motive force in the electric mains constant it is desirable to have, in the first place, several generating machines, also a number of reservoir batteries as before explained." In the provisional specification the last clause of that sentence—"also a number of reservoir batteries, as before explained"—did not occur. Instead, the sentence ran thus: "next it is necessary to have some regulator such as that about to be described." The regulator was an electrometer, the needle of which oscillated between two metal points. When the voltage was too high it touched one, and completed a circuit which actuated a lever so as to shut off steam, and thus diminish the speed of the dynamo.

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When the voltage got too low the needle, deflecting in the opposite direction, touched another metal point, which produced the contrary effect and quickened the motion of the dynamo. This regulator is struck out by disclaimer, and now in the altered specification the only regulation is keeping the electro-motive force in the mains constant, which is to be done by (1.) several generating machines, and (2.) a number of reservoir batteries. I find it impossible to make the provisional and complete specifications consistent in this respect. The provisional describes the mode of keeping the electro-motive force constant: (1.) several generating machines, and (2.) the electrometer regulator. It does not mention the secondary batteries as useful for that purpose, but as reservoirs only. Mr. *Lane Fox* argued before us that their purpose was to act as a sort of buffer, to use the expression he frequently employed; and, accepting an illustration suggested by the Bench, he said their office was something like that of the air vessel in a force pump which corrects the pulsation of the pump, and causes the water to be delivered in a continuous stream. I am satisfied by the evidence that this would not be the effect of the secondary batteries, if employed as described by his patent. He directs them to be charged from the dynamo while some lamps are in the circuit. Taking the voltage requisite for the lamps at 100, I think it is proved that the batteries, at least, with any reasonable size of lead plate, could not be charged so as to be useful for this purpose with a current of less than 115 to 125 volts, which would destroy the lamps in a short time. Even if properly charged they could not practically be used to keep up the current when the dynamo was not running, without an arrangement by which the number of battery cells in communication with the main wire could be altered from time to time by a system of switches. If the use of the batteries was to keep the electro-motive force constant in the main wires there are two objections to this patent, each of which seems to me formidable. First, this is not contemplated by the provisional specification, which describes a different mode of effecting that purpose, and therefore differs essentially from the complete specification; and, secondly, the mode of using the batteries described in the complete specification of this patent would not

produce the effect of keeping the electro-motive force constant in the main wire.

The use of these batteries as reservoirs of electricity was merely using them for the purpose for which they were invented by *Planté*, and a patent for putting such reservoirs in connection with the main wires in a system of electric lighting involves no invention whatever, any more than using water reservoirs in connection with pipes supplying a city with water.

By disclaimer the Plaintiff has struck out from his specification the regulation by the electrometer. As I read the provisional specification, this, and the employment of several generating machines was the only mode of regulation which the patentee originally contemplated. But I think by regulation, he did mean keeping the electro-motive force as nearly as possible constant in the main wires. The disclaimer has struck out one device for effecting this, which is said, both in the provisional and complete specification, to be "necessary," and it may be a question whether this is not an alteration of the invention which makes the combination now claimed, essentially different.

But the most serious objection, in the view of this patent which I take, is that it is a crude description of an invention which, as described, had no practical utility. None of the elements of the combination was new in itself. I am satisfied, as I have said, that the combination, as described by the patentee, could not be efficiently worked without at least two essential alterations. One, that the secondary batteries must be charged when the lamps were not in the circuit with a current of electricity of a voltage which the lamps would not bear, and, secondly, that these batteries would be practically useless unless they were worked with switches as I have before mentioned. Without such an arrangement they could not be made to keep the electro-motive force constant in the main wires. The automatic action which *Lane Fox* supposes would accomplish this is, I am persuaded, a mere delusion. These two essential alterations were necessary to make accumulators of use. Neither of them is contemplated by *Lane Fox*. Assuming that he was the first to suggest the placing of

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reservoir batteries in communication with the main wires in a system of electric lighting by branches from the main, his mode of doing this was practically useless; and, for this reason, I agree with the result at which the learned Judge has arrived. I think the patent is invalid and that this appeal should be dismissed.

Solicitors: *Vandercrom, Hardy, Oatway & Doulton; Deacon Gibson & Medcalf.*

W. W. K.

TULLIS *v.* JACSON.

CHITTY, J.

1892
July 7.

[1890 T. 2179.]

Building Contract—Arbitrator—Award not to be set aside on ground of Fraud on part of Arbitrator—Public Policy—Valid Agreement.

An agreement between the parties to a building contract that the valuations, certificates, orders, and awards of the architect shall be final and binding, and shall not be set aside or attempted to be set aside on any ground, or for any reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy, is, in the absence of fraud on the part of either party, a valid agreement, and not void as being against public policy.

It is competent for the parties to agree that the question of fraud on the part of the arbitrator shall not be raised by either of them.

E. R. HARRIS, by his will, bequeathed the residue of his estate to trustees, and directed that they should erect a free public library and museum at *Preston*, and apply such part of his estate as should be necessary in the building of such library and museum.

By an order dated the 24th of June, 1882, made in an action intituled, "In the Matter of the Estate of *E. R. Harris*. *Jacson* v. *Governors of Queen Anne's Bounty* [1878 II. 189]," a scheme for the erection of the free public library was approved, and the Defendants, *Charles Roger Jacson*, *Charles Harrison Wood*, and *David Irvin*, the trustees of the will, were, together with other persons, the survivors of whom were also Defendants, appointed a committee to carry out the scheme.

The committee advertised for tenders for the execution of the work to be erected, and the tender of the Plaintiffs, who were contractors at *Preston*, was accepted, and an agreement, dated the 27th of November, 1883, was entered into between the committee, of the one part, and the Plaintiffs, of the other part, with regard to the execution of the works, and the payment to the Plaintiffs of the amounts due to them, pursuant to the architect's certificates, out of the funds in Court, to the credit of *Jacson* v. *Governors of Queen Anne's Bounty*. The agreement provided that the committee were to be under no personal liability to the Plaintiffs.

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The Defendant *Hibbert* was afterwards appointed architect, and was to be paid out of the same funds. The Defendant *Walmsley* was also employed by the committee and was to be paid out of the same funds. The Plaintiffs claimed priority against both *Hibbert* and *Walmsley*.

Questions as to the validity of the final certificate given by the architect, which was disputed on the ground of fraud, having arisen, this action was commenced, amongst other things, for an account of what was due to the Plaintiffs under and by virtue of the agreement, and for labour and materials supplied at the request of the Defendants. No relief was asked at the trial against *Hibbert*.

The Plaintiffs alleged, in par. 13 of their statement of claim, that the Defendant *Hibbert*, the architect (as the committee well knew), had not *bonâ fide* certified the amount due to the Plaintiffs, but had knowingly certified for a smaller sum than was, in fact, due to the Plaintiffs, in order to have a larger sum available for the sum claimed by him.

The only point in the case calling for a report was as to the validity of the 31st clause of the agreement, which, so far as is material, was as follows:—

"That in case of any doubts, disputes, or differences arising or happening touching or concerning the works to be executed by the said contractors, or any of such works . . . . such doubts, disputes, or differences shall from time to time be referred to and left to the sole and absolute arbitrament and decision of the said architect, and his decision shall be final and binding on all parties . . . . and the directions, decisions, admeasurements, valuations, certificates, orders, and awards of the said architect . . . . shall be final and binding upon the committee and the contractors respectively, and shall not be set aside or attempted to be set aside by reason or on account of any technical or legal defects therein or in the contract, or on account of any informality, omission, or delay, or error of proceeding in or about the same or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy."

Levett, Q.C., and *T. R. Hughes*, for the Plaintiffs:—

The 31st clause is a despotic clause, and it is against public policy, and the Court will not listen to any such stipulation in any contract, however solemn.

[CHITTY, J.:—Does not the clause mean that you must not charge fraud against *Hibbert*, whose character is well known to you.]

Hibbert has abused his powers by endeavouring to extort money from us.

[They referred to *Kemp* v. *Rose* (1); *Kimberley* v. *Dick* (2); *Stevenson* v. *Watson* (3).]

Whitehorne, Q.C., and *Church*, for the Defendants, the committee:—

No case of fraud is opened as against us, and no fraud is alleged except in paragraph 13 of the statement of claim, and clause 31 was inserted to provide against fraud on the part of the architect.

Farwell, Q.C., and *George Henderson*, for the Defendant *Hibbert*.

T. B. Napier, for the Defendant *Walmsley*.

CHITTY, J. (in the course of his judgment, and having read the 31st clause as set out above, proceeded):—

The trustees (the committee) are not now charged with, and have not been guilty of, fraud. It is said that the latter part of the clause is void on the ground of public policy. Whenever public policy is mentioned, it is the duty of the Court to look carefully into the matter, and not arbitrarily extend the rules upon which certain decisions have turned in regard to public policy. It is said that the clause is void as being against public policy, because in substance it is an agreement on the part of the Plaintiffs and Defendants through the committee not to set up fraud, and the argument proceeds in this way. "The Court will not listen to any such stipulation to be found in any contract

(1) 1 Giff. 258. (2) Law Rep. 13 Eq. 1.
(3) 4 C. P. D. 148.

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however solemn." To some portion of this argument I accede. If a contract was obtained by fraud, and in the contract itself there was the term inserted that neither party should impeach the contract on the ground of fraud, it may well be that such a term would not stand, and the reason is obvious, that the Court would set aside that contract, because it was obtained by fraud, and setting aside the contract, it would set aside the stipulation. That is a case I put by way of illustration, of fraud between the parties to the contract in its inception. It may well be also, that if there was some stipulation where some subsequent things had to be done which went to fraud on the part of either of the contracting parties, such a clause as that would not hold. But the case I have to deal with appears to me to be an entirely different one. Those who frame clauses in building contracts, which some years ago were stringent, have by degrees kept on making them more and more stringent by reason of the consequences that follow from opening a certificate, and the enormous cost and litigation that arises where the work is a large work like a railway or a large public building from any Court of Justice endeavouring to take the account, an account of thousands and thousands of items on every one of which skilful advisers may raise some issue, whether the amount should stand for the sum charged, or for some less sum, or for some greater sum. A litigation of that kind it is almost impossible to bring to a conclusion in a Court of Justice where the parties are entitled to be heard, and to insist on every possible objection. It does appear to me that those who deal in matters of this kind are wise in making the clauses more and more stringent. It is of course for the contractor when he enters into a contract of this kind to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific; but they do it as business men, they do it for better or worse, and they think on the whole it is very unlikely that any architect selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject. Then it appears to me that the policy of the law does not require that I should hold, in the case I am now dealing with, a clause like the present to be void.

To put an illustration, suppose a gentleman who is going to have a house built for him enters into a complex agreement with the contractor, in the performance of which innumerable questions may arise, says, "Will you agree with me (for if you will, I will agree with you) that nothing on earth shall upset the certificate that is given?" Why is that unfair or against public policy? The late Master of the Rolls (Sir G. *Jessel*), in the case of the *Printing and Numerical Registering Co.* v. *Sampson* (1), says this: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Entirely agreeing as I do with these remarks, I myself can see no reason why grown up men should not be allowed to contract in these terms. "Neither of us," each says to the other, and each agrees with the other, "will ever raise the charge of fraud." Persons will shrink very often from charges of this kind, and those who are persistent, will, by making charges, induce persons to come to terms of compromise. It seems to me that this clause is addressed to get out of what the parties may consider evils, and which I have endeavoured to describe. The clause therefore stands thus: "both of us agree," to our advantage or disadvantage as it may turn out, "that every certificate given by the gentleman named shall stand firm and good and shall not be questioned even for fraud." That that is the meaning of the clause I have no doubt. Mr. *Levett* argued that the word "charge" must mean unfounded charge, and he said that because he found the words "pretence" (which he says means something not true) "suggestion" (something that you dare not state openly), and "insinuation" (something else that you dare not state, will not state, and have not the courage to state). But "charge" was his difficulty, and he said the word "charge" is coloured by all the other three words there. But the answer, I think, is plain. "Charge" is the word which has been, I think, deliberately inserted here, because, with great respect to the

(1) Law Rep. 19 Eq. 462, 465.

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learned counsel who advanced it, to put in "unfounded charge" is almost to make nonsense of it. Any man who makes an unfounded charge of fraud fails in it, and no protection is required. Consequently, if that were the meaning of the clause it would have no operation whatever.

The sum of my judgment is this, that the parties meant what they have said, and that the term "charge" here is used deliberately, "We will have no question of this kind raised as against the certificate." I need hardly say that if the case had been that the trustees themselves had been party in any way to the fraud it would have been very different, and it may be that Mr. *Levett's* argument (and as at present advised I think it would have been so) would have succeeded. The trustees are not even insisting on a certificate which they believe to be fraudulent. That disposes of the main point in the action, and it shews that the action is not justified as against the Defendants, whom I have shortly called the trustees.

Mr. *Hibbert*, the architect, is charged with fraud, and on such a claim as this the charge of fraud cannot be entered upon, because this is not an action against him to recover damages from him for an alleged fraud or for a fraud. The allegations of fraud as against him were inserted merely for the purpose of founding the relief against the trustees. Still, although no relief is asked against him, these allegations in the statement of claim do stand against him, and the case has been so shaped that I cannot even enter upon them as between him and the Plaintiffs. It necessarily follows that I must dismiss the action as against him with costs so far as relate to these allegations of fraud.

[His Lordship then disposed of the action as against *Walmsley*, and then dismissed the whole action with costs as against the Committee and the Defendant *Hibbert*.]

Solicitors: *Burton, Yeates, Hart, & Burton*, agents for *Tyrer, Kenion, Tyrer, & Simpson, Liverpool; Church*, agent for *W. Banks & Co., Preston; J. Percy Chadwick*, agent for *Buck, Dicksons & Cockshott, Preston; R. P. Walton.*

G. M.

BADISCHE ANILIN UND SODA FABRIK *v.* SCHOTT, SEGNER & CO.

CHITTY, J.
1892
July 22, 28.

[1892 B. 3220.]

Covenant in Restraint of Trade—Limitation as to Time or Space—Reasonableness—Validity—Public Policy.

Where a covenant in restraint of trade is general, that is, without qualification, it is bad, as being unreasonable and contrary to public policy; where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable, and, if reasonable, it is good in law.

In considering the question of reasonableness, the points to which the attention of the Court is specially directed are the limits of time and of space, and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade.

The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can be possibly required for the protection of the covenantee, the covenant is unreasonable; but if the restraint is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable; and where the covenant is qualified as to time, the burden lies on the covenantor of shewing that the restraint is unreasonable.

MOTION.

The Plaintiffs were a foreign corporation, the principal seat of their business being on the *Rhine*. Their business was of a special character, consisting of the manufacture and sale of aniline and alizarine colours, tar products, and the like.

The Plaintiffs carried on their business in all parts of the world through agents, partly by branch establishments and partly direct. They had branches or agencies in nearly all the States of *Europe*, and also at the following, among other places, namely, *New York*, *Mexico*, *Rio Janeiro*, *Aleppo*, *Beyrout*, *Bombay*, *Calcutta*, *Damascus*, *Hong Kong*, *Rangoon*, *Shanghai*, *Smyrna*, *Yokohama*, *Cairo*, *Tripoli*, and *Tunis*. In *Australia*, and other places where they had not branches or agencies, their trade was direct.

For many years previously to 1888, the Defendants had been employed by the Plaintiffs as their agents in this country.

By an agreement dated the 12th of March, 1888 (which

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agreement was a continuation of prior agreements), the Defendants were constituted the agents of the Plaintiffs' business at *Manchester*. In the management of this agency, the Defendants' duties were the purchase of raw material in *England* and the sale of the Plaintiffs' products in the north of *England*, comprising the counties of *Chester*, *Cumberland*, *Derby*, *Lancaster*, *Lincoln*, *Leicester*, *Monmouth*, *Northampton*, *Northumberland*, *Nottingham*, *Salop*, *Stafford*, *Warwick*, *Westmoreland*, *Worcester*, and *York*, and also in *Wales*. The agency for sale in the above places was exclusive.

The Defendants, by the same agreement, bound themselves to continue the business under the existing style of *Schott, Segner & Co.*, to devote all their time and energy exclusively to the business, and to keep the Plaintiffs continually posted about their trade. On the other hand, the Plaintiffs bound themselves not to effect sales direct to the above districts, and not to carry on direct correspondence with customers in the same districts. The Defendants were to receive for their services a fixed salary of £1200 a year and a specified commission on the gross amount of sales, being 2½ per cent. on certain products and 2 per cent. on others. The Defendants had also the right under the above style to purchase and sell on account of the Plaintiffs such other articles not made by the Plaintiffs as are used for dyeing and printing purposes, and could be worked along with the articles of the Plaintiffs' manufacture.

The agreement contained provisions as to the capital embarked in the agency business, and for ascertaining the net profits, one half of which belonged to the Defendants.

The term for which the agency was established was four years, determinable by notice on the 30th June, 1892; but if not then determined, it was to run on for periods of two years, also determinable by notice.

The agreement was in the *German* language, and the 7th clause, as translated, was as follows: "Messrs. *Alfred Schott* and *Phillip Segner* bind themselves, in the event of one or the other, or both of them, retiring from this agreement, or after this latter has come to a termination in one way or another for three consecutive years after such retirement or such termination of the

contract, not to enter any like or similar business, not to start a business of that kind themselves, nor to give information of any kind about the business."

The Defendants duly determined the agency on the 30th of June, 1892; but, contrary to the provision contained in clause 7 of the agreement of the 12th of March, 1888, they commenced to carry on business in *Manchester* as dealers in chemicals, colours, and other products manufactured by the Plaintiffs, under the style of *Schott, Segner & Co.*, and solicited the custom of the Plaintiffs' customers.

The Plaintiffs thereupon commenced this action, and now moved for an injunction to restrain the Defendants for three years from the 30th of June, 1892, from carrying on or being concerned or interested in the business of dealers in chemicals, colours, or other products manufactured by the Plaintiffs within the counties above mentioned.

The question was whether or not the 7th clause of the agreement of the 12th of March, 1888, was void, as being in restraint of trade. The breach was admitted by the Defendants.

Rigby, Q.C., *Farwell*, Q.C., and *Arthur Underhill*, in support of the motion:—

There is no absolute rule that a covenant in restraint of trade is void merely because it is unlimited in regard to space. In *Rousillon* v. *Rousillon* (1) the covenant was limited as to time, but not as to space, and it was held to be valid, and an injunction was granted. In the judgment in that case the previous authorities were reviewed, including the *Leather Cloth Company* v. *Lorsont* (2), and the observations made in that case by *James*, V.C. In *Davies* v. *Davies* (3), the covenant was held to be in restraint of trade generally, and therefore bad in law. Where the restraint is subject to some qualification, either as to time or space, then the question arises whether or not it is reasonable, and, if reasonable, it is good in law.

[They also referred to *Mills* v. *Dunham* (4); *National Provincial Bank of England* v. *Marshall* (5).]

(1) 14 Ch. D. 351.
(2) Law Rep. 9 Eq. 345, 353.
(3) 36 Ch. D. 359.
(4) [1891] 1 Ch. 576.
(5) 40 Ch. D. 112.

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[CHITTY, J., referred to the *Printing and Numerical Registering Company* v. *Sampson* (1).]

Channell, Q.C., and *R. J. Parker*, for the Defendants:—

The restraint being unlimited as to space, the covenant is clearly bad. There is a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area, which in this case it practically is. In *Davies* v. *Davies* (2), *Cotton*, L.J., used expressions which shewed that he did not altogether agree with the decision in *Rousillon* v. *Rousillon* (3). The restraint is greater than can possibly be required for the protection of the business of the Plaintiffs; therefore the covenant is unreasonable and void: *Hitchcock* v. *Coker* (4); *Ward* v. *Byrne* (5).

Rigby, in reply.

July 28. CHITTY, J. (after stating the facts, continued as follows):—

The restraint thus sought to be imposed is limited as to time, but unlimited as to space. It was argued for the Defendants that, being unlimited as to space, the restraint is necessarily void, and that there exists a hard and fast rule of law whereby all such contracts are void, as being contrary to public policy. But this argument is directly opposed to the decision of Sir *Edward Fry* in *Rousillon* v. *Rousillon*. In that case it was held that there is no absolute rule that a covenant in restraint of trade is void merely because it is unlimited in regard to space. The defendant there was a traveller for the plaintiffs' firm in the champagne trade in *England* and *Scotland*, and occasionally in *Holland*. The covenant, limited as to time but not as to space, was held to be valid, and an injunction was granted accordingly. In the judgment, the previous authorities were considered and reviewed, including the *Leather Cloth Company* v. *Lorsont* (6), and the important observations made in that case by *James*, L.J. (then Vice-Chancellor). I consider the decision in *Rousillon* v. *Rousillon* to be binding on me; and, further, I think that the

(1) Law Rep. 19 Eq. 462.
(2) 36 Ch. D. 359.
(3) 14 Ch. D. 351.
(4) 6 A. & E. 438.
(5) 5 M. & W. 548.
(6) Law Rep. 9 Eq. 345, 353.

decision was right. Counsel for the Defendants referred to the subsequent decision of the Court of Appeal in *Davies* v. *Davies* (1). But, whatever observations on *Rousillon* v. *Rousillon* (2) may have fallen from *Cotton*, L.J., in the course of his judgment in *Davies* v. *Davies*, the Court of Appeal certainly did not overrule *Rousillon* v. *Rousillon*. The Court held that the covenant before it was in restraint of trade generally, and that such a covenant was bad in law.

The result of the authorities down to the present time on this question of a covenant in restaint of trade appears to be as follows. Where the restraint is general, that is, without qualification, it is bad as being unreasonable and contrary to public policy; where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable, and, if reasonable, it is good in law. In considering the question of reasonableness, the points to which the attention of the Court is specially directed are the limits of time and of space and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade. The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can possibly be required for the protection of the business of the covenantee the covenant is unreasonable and void: *Hitchcock* v. *Coker* (3); *Ward* v. *Byrne* (4); *Rousillon* v. *Rousillon* (5). In *Rousillon* v. *Rousillon*, the converse proposition was laid down by Sir *E. Fry*. But if the restraint is not greater than can possibly be required for the protection of the business of the covenantee, it is not unreasonable; and Sir *E. Fry* also held, in accordance with previous authority, that where the covenant is qualified as to time the burden lies on the covenantor of shewing that the restraint is unreasonable.

The doctrine as to restraint of trade is founded upon public policy, and has in many respects, as is shewn by the judgments in *Davies* v. *Davies*, undergone considerable change since *Mitchel* v. *Reynolds* (6). In connection with this subject of public

(1) 36 Ch. D. 359.
(2) 14 Ch. D. 351.
(3) 6 A. & E. 438, 453.
(4) 5 M. & W. 548, 561.
(5) 14 Ch. D. 363.
(6) 1 P. Wms. 181.

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policy, the forcible observations of Sir *G. Jessel* in the *Printing and Numerical Registering Company* v. *Sampson* (1) may be usefully cited. He said (2): "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The circumstances which may be legitimately inquired into on this question of reasonableness appear to me to include the general circumstances under which the trade is carried on at the time when the covenant is entered into. The improvements in the means of communication which have taken place in recent times by reason of railways, steamships, postal facilities, the telegraph, and the telephone, are, I think, within the scope of the inquiry, and bear particularly on the question of space; they are relevant more or less in proportion to the greater or lesser area within which the trade sought to be protected is carried on and to the varying nature of the trade itself. Such matters would have little or no relevancy if the question related to the protection of a small local business such as that of a village baker or cobbler, and if the restraint sought to be imposed on a journeyman baker or cobbler, though limited as to time, extended to the whole of *England*—such a restraint would be unreasonable and vexatious. But they would be relevant in reference to the large trade of a merchant and a widely-extended news-collecting agency, or to any other trade covering a great portion of the globe. What might in former ages have been considered an unreasonable restriction would not necessarily be so held in the altered circumstances of the present time.

I proceed to apply these general observations to the facts of the case before me. In the range of articles with which it is concerned the Plaintiffs' trade is limited; it applies, not to all

(1) Law Rep. 19 Eq. 462. (2) Law Rep. 19 Eq. 465.

chemical products, but to a specified class. In the range of area to which it is applied it is most extensive—it is practically unlimited in space; the Plaintiffs are, I think, justified in saying, as they do by their affidavits, that their trade is world-wide—there is no evidence to the contrary. It was within the contemplation of the parties to the agreement that the Defendants, placed as they were in a position of high trust and confidence, would acquire a knowledge of the methods by which the Plaintiffs carried on their business—a knowledge of their customers and their requirements, and of the prices charged to them, and generally of those details which would make the Defendants dangerous competitors when the connection was severed. The Defendants, with their eyes open, and after their previous experience during many years of the nature of the agency, deliberately entered into the agreement, and consented to be bound by the restraining stipulations. Although not conclusive on the subject, the opinion of mercantile men, manifested by their acts, is not to be disregarded on the question of reasonableness. In my opinion the clause is not unreasonable for the protection of the Plaintiffs' trade. It amounts to this: The Defendants say, "For the limited period of three years you" (the Plaintiffs) "shall have a breathing-time, during which we will abstain from using the knowledge we have acquired in your employ against you by setting up a rival trade." This is far remote from the case of an attempt to debar during a limited time a handicraftsman from plying his craft anywhere in the world; it is in effect a sale by the Defendants of their interest in the goodwill of a large business built up by the capital, skill, and industry of the contracting parties. The Defendants have received a large remuneration, and, what is more, that which they themselves considered to be an adequate price for the contract on their part.

To hold the stipulation void would tend to deprive persons in the position of the Defendants of the advantage of making their own bargains for their remuneration, and would, in my opinion, unnecessarily interfere with their freedom of contract to their detriment, and to an extent not required by law.

[His Lordship granted an injunction restraining the Defendants until judgment or further order for the period of three years from

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the 30th of June, 1892, from entering into any business similar to that carried on by the Plaintiffs, and from starting any business of that kind themselves.]

Solicitors: *Cruesemann & Rouse; Busk & Co.*

G. M.

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COTTON *v.* IMPERIAL AND FOREIGN AGENCY AND INVESTMENT CORPORATION.

[1892 C. 2882.]

Company—Memorandum of Association—Reconstruction—Sale of Assets to New Company—Shares in Purchasing Company—Voluntary Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161 [*Revised Ed. Statutes, vol. xiv., p.* 237].

It is competent for a company by its memorandum of association to exclude the operation of the 161st section of the *Companies Act*, 1862, in the event of a sale by the company of its undertakings to another company, the whole or part of the consideration for such sale being shares in the purchasing company, notwithstanding that at the time of the execution of the contract for sale it is in contemplation to wind up the selling company voluntarily.

MOTION.

The *Imperial and Foreign Agency and Investment Corporation*, hereinafter called the *Old Company*, was formed in 1889. The capital consisted of founders' shares, preferred shares, and deferred shares.

The memorandum of association stated that the object of the company, amongst other things, was (S) to sell, lease, or otherwise dispose of the company's undertaking, or any part thereof, or any property, or interest in property, from time to time belonging to the company, for such consideration as the company might think fit; and in particular for shares, stock, obligations, debentures, debenture stock, scrip, or securities of any company; and (T) to divide any shares, stock, bonds, obligations, debenture stock, scrip, or securities belonging to the company among the members in specie.

It having been deemed expedient to wind up the company, an extraordinary general meeting of the company was held on the

13th of April, 1892, at which a resolution was passed approving of the sale and transfer of the undertakings of the *Old Company* to a *New Company*, to be incorporated for the purpose, under the same name with the word *New* prefixed, in accordance with the terms of a draft agreement submitted to the meeting. On the same 13th of April, at the same meeting, a special resolution was proposed for the voluntary winding up of the *Old Company* and for the appointment of two liquidators; but such resolution was lost.

On the 2nd of May, 1892, the agreement between the *Old Company* and the *New Company* was executed for the sale and transfer of the *Old Company's* undertaking to the *New Company*, in consideration of the allotment to the *Old Company* of fully paid-up shares in the *New Company*.

At an extraordinary general meeting of the *Old Company*, held on the 4th of May, 1892, a special resolution was passed for the voluntary winding up of that company and the appointment of two liquidators; and on the 25th of May, at another extraordinary general meeting, the resolution passed at the meeting of the 4th of May was confirmed, and it was resolved that the liquidators should be authorized to divide among the members of the *Old Company*, so far as possible, the paid-up shares receivable under the agreement of the 2nd of May, 1892.

The Plaintiff was the holder of founders' shares as well as other shares.

In July, 1892, the Plaintiff took out a summons in the winding-up of the *Old Company*, before Mr. Justice *Vaughan Williams*, asking that it might be declared that he was entitled to compel the liquidators to purchase the shares and all other (if any) the interest held by or belonging to him in the *Old Company*, at a price to be determined in accordance with the provisions of sects. 161 and 162 of the *Companies Act*, 1862, and that the liquidators might be restrained from transferring the assets of the *Old Company* to the *New Company*, when his Lordship held, that the transaction did not come within the 161st section, and was of opinion that if the Plaintiff had any remedy it was by an action to set aside the agreement.

The Plaintiff thereupon commenced this action on behalf of

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himself and all other the shareholders in the *Old Company*, asking that it might be declared that the agreement of the 2nd of May, 1892, was *ultrà vires* the *Old Company*; and for an injunction to restrain such company and the liquidators from proceeding to carry the agreement into effect; or, in the alternative, for a declaration that the Plaintiff and all other dissentient shareholders of the *Old Company* were entitled to require the liquidators either to abstain from carrying the agreement into effect or to purchase the interest held by them at a price to be determined in manner prescribed by sect. 161 (1) of the *Companies Act*, 1862; and to restrain the liquidators from dealing with the assets of the *Old Company* without providing for the payment of the amount due to them in respect of the purchase of such interest.

The Plaintiff now moved in the terms of his writ.

(1) 25 & 26 Vict. c. 89, s. 161: "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or in part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefits from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

Byrne, Q.C., and *Whitehouse*, for the Plaintiff, in support of the motion:—

At the time of the meeting of the 13th of April, when the agreement for the sale and transfer of the business of the old company to the new was approved of, it was in contemplation to wind up the company voluntarily, although the resolution was not then passed. When the resolution to wind up voluntarily was passed on the 4th of May, two days after the execution of the agreement, we submit that the 161st section came into operation, notwithstanding the existence in the memorandum of association of clauses S and T; and that the Plaintiff and the other dissentient members are entitled to have their interests realized and valued in accordance with the powers of that section.

A company cannot by its memorandum of association contract itself out of the provisions of the Act of Parliament: *Walker* v. *London Tramways Company* (1).

[They also referred to *In re Irrigation Company of France* (2), and *Griffith* v. *Paget* (3).]

Farwell, Q.C., and *Theobald*, for the Defendants:—

When the agreement was executed the company was a going concern, and the adoption of the contract was within the objects of the company, and was *intrà vires*; and the resolution afterwards to wind up voluntarily did not bring the transaction within the 161st section.

We submit that this motion must be refused.

[They referred to *Grant* v. *United Kingdom Switchback Railways Company* (4) and *In re Argus Life Assurance Company* (5).]

Byrne, in reply.

CHITTY, J.:—

The motion is to restrain the *Old Company*, in which the Plaintiff is a shareholder, and the liquidators of that company,

(1) 12 Ch. D. 705.
(2) Law Rep. 6 Ch. 176.
(3) 5 Ch. D. 894.
(4) 40 Ch. D. 135.
(5) 39 Ch. D. 571.

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from proceeding to carry into effect the agreement of the 2nd of May, 1892. That agreement was entered into between the *Old Company* and a *New Company* which has the same name, with the addition of the word "*New*," and who are also Defendants.

In the memorandum of association of the *Old Company* there is the usual clause stating the objects for which the company is established, and they are numerous; but I need only to refer to that one under the letter "S." [His Lordship read the clause as set out above.]

Now it is said that the power which is thus taken by the company to itself, and assented to by all the persons who were or were to become members of the company, is *ultrà vires*; and I have been at a loss to understand from the beginning of the argument to the present moment how that can be. The company might have for one of its objects the buying and working of an hotel, and it buys the hotel and works it, but it takes power in its memorandum of association to sell the whole of its undertaking. That is a good power. It can sell the hotel, and, when it has got the money, the money will have to be dealt with according to the constitution of the company. Instead of selling for money, this company by its memorandum says that the sale may be for shares in another company. I see nothing unlawful in that whatever. I am really at a loss to know how to put the argument, because, when the shares in the other company are thus acquired through the medium of a sale, these shares become the property of the selling company, and have to be dealt with according to the constitution of that company. In the memorandum before me, there is under the letter "T" power to divide the shares, debenture stock, and securities belonging to the company among the members in specie. I am not concerned with that power at the present moment; but it shews that the *Old Company* contemplated selling, as it clearly did, for shares, and dividing them among the members. Of course, that must be subject to all the rights of the members as defined by the memorandum and articles of association. They must divide the shares and the other securities mentioned if they take them upon the sale according to the rights of the members *inter se*; but they may clearly, in my opinion, take, as the consideration for

the sale, shares in another company. That being so, it was necessary, in conformity with clause 8, which provided that the consideration was to be such as the company might think fit, that there should be a meeting of the *Old Company* to determine whether they would take shares as a consideration for a sale. A meeting was duly convened and held, and a resolution was passed, the effect of which was that the directors were authorized by the company to enter into the agreement of the 2nd of May, 1892. It is in substance an agreement for the transfer of the whole of its undertaking by the *Old Company* to the *New Company*, the consideration being shares.

In my opinion what has been done by the directors is authorized by the memorandum, and by the resolution of the company acting in pursuance of the memorandum.

Now, it certainly is the case that when the directors proposed the resolution in regard to this sale for shares to the meeting they also proposed that there should be a winding-up, which proposition was, however, not carried, while the other was. Afterwards the directors thought it would still be advisable to wind up if the shareholders were of that opinion; and subsequent meetings were held, and the result was that a resolution was passed to wind up voluntarily.

These latter facts form another ground upon which the argument in support of this motion is based. It is said that now the 161st section of the Act of 1862 is brought in, and that inasmuch as there was at the time when the first resolution was carried, a proposal before the meeting to wind up, the resolution as to the sale was *ultrà vires* because the clause in the memorandum of association was rendered void by the 161st section. With great respect to those who put the argument before the Court, it seems to me that that is extravagant.

This was a good resolution when it was passed, and it is contrary to the settled decisions upon the construction of Acts of Parliament to go upon a "tendency." You must find that the thing which is done, and which is said to be void, is, when the Act of Parliament is properly understood, a violation of the Act: *Jeffries* v. *Alexander* (1); *Philpott* v. *St. George's Hospital* (2).

(1) 8 H. L. C. 594. (2) 6 H. L. C. 338.

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The 161st section is in substance this—when there is a winding-up, whether voluntarily or by the Court or under supervision, the duty of the liquidators under the Act of Parliament is to turn all the assets of the company into money, and, having paid the creditors and the costs of the winding-up, then to distribute among the members according to their equities the surplus, if there be any. Then it was seen that there were many cases in which a company might wind itself up voluntarily or the like merely for the purpose of reconstruction, and that it would be very advantageous that there should be taken a power in substance for the company to reconstruct itself. That was one of the objects that was sought to be accomplished by the 161st section; but the gist of the enactment is this—that the liquidators in a winding-up, instead of selling for money, may sell for shares; but, as a safeguard against that, and against imposing possibly a liability upon a member of the company which is being wound up by seeking to force upon him shares which were not fully paid up, the Legislature has, by way of protecting his interest, said in substance that if he dissents he may receive the value of his shares in money. That is, in short, an explanation of the meaning and effect of the 161st section. It relates to what may be done where there is a winding-up; and although the section commences with the words, "Where any company is proposed to be . . . wound up," the result is plain that the power is only conferred upon the liquidator.

Now, I take this clause, and endeavour to apply it to the power in the memorandum. The company has sold its undertaking for shares in another company. What then? This 161st section may still have an operation upon the shares which have thus been taken as the consideration. I can see no inconsistency in saying that the liquidators, if otherwise duly authorized according to the 161st section, might actually sell the shares which they take from the new company, they being part of the assets of the old, and sell them to some other company on the terms of their taking shares in that other company. I can see therefore upon this short statement no inconsistency between the 161st section and the power taken by the memorandum of association. There is no prohibition in the 161st section. It

is a power conferred upon the liquidators for the more convenient winding up of a company, and it is not a violation of anything to be found in that section for a company, by its own memorandum of association, to take power to sell its assets for shares in another company, and even if it should think fit (because this would be the agreement of all the members of the company) to divide in specie among the shareholders the shares which have been thus acquired.

I have nothing to decide further on the present motion with regard to clause T of the memorandum of association.

That disposes of the motion, because, although there is an alternative in the notice of motion, that question has been before Mr. Justice *Vaughan Williams*, and he has held that the transaction of sale is not within the 161st section, and that being so he declined to interfere, and as far as I can see the liquidators are not proceeding under that section. The opinion of Mr. Justice *Vaughan Williams* appears to have been that the Plaintiff made a mistake, that the company were not acting under the 161st section, that he had come to the wrong Court in the wrong manner, and that, if there was any question as to the clause in the memorandum being *ultrà vires*, then that was a matter to be litigated in the usual way by an action properly brought in this Division.

The result is, I refuse the motion; the costs to be the Defendants' costs in any event.

Solicitors: *Nunn & Popham; Parker, Garrett, & Parker.*

G. M.

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Aug. 10, 12.

LAMB *v.* EVANS.

[1892 L. 1855.]

Copyright — Directory — Headings — Advertisements—Employer and Agent—Rival Publication—Injunction—Copyright Act (5 & 6 *Vict. c.* 45) [*Revised Ed. Statutes, vol. viii., p.* 1152].

In a trades directory, the headings are the subject of copyright, although the letter-press consists only of advertisements.

Canvassers, who had been employed by the Plaintiff, the registered proprietor of a trades directory, under agreements which bound them to devote themselves in a particular district exclusively to obtaining advertisements from traders for the Plaintiff's directory, and also to supply him with the blocks and materials necessary for producing such advertisements, proposed, at the expiration of their agreements with the Plaintiff, to assist a rival publication in procuring similar advertisements:—

Held, that they were not entitled to use the materials so obtained for the purposes of any publication other than the Plaintiff's.

Form of interlocutory injunction.

MOTION.

This was an application for an interim injunction to restrain infringement of copyright. The facts material for the purposes of this report, and the result of the evidence (which was very voluminous and conflicting), as stated by the Judge, were as follows:—

The Plaintiff, *Alexander Lamb*, was the proprietor and publisher of a book called "The International Guide to British and Foreign Merchants and Manufacturers," which had gone through several editions, and was stated to be a useful and valuable production; the Plaintiff had spent considerable sums of money and much labour in the completion of this work. A portion of it was devoted to Continental tradesmen, and was called "the Continental Section," and it was with reference to this portion of the work that the present application was made. The whole work had been registered by the Plaintiff at *Stationers' Hall.*

The Continental Section was not an ordinary directory of all trades on the Continent, or of all traders in any particular country or town, but it contained a list of such traders as desired their

goods to be advertised therein This part of the work was arranged under special headings, such as "Absinthe," and so on, with translations of the headings in English, French, German, and Spanish; and under these were the names of the traders in alphabetical order, with their addresses, trade-marks, and other similar illustrations, intended to assist persons desirous of dealing with them.

In order to obtain these advertisements, the Plaintiff employed travellers. Amongst these, he had employed two brothers, the Defendants *Evans*, under agreements, by which a certain district was allotted to each traveller to work in and canvass the traders therein, for the purpose of obtaining advertisements; the Plaintiff agreeing to employ the traveller exclusively in that district, and the traveller agreeing to devote himself therein exclusively to the Plaintiff's service. The mode of remuneration was by a percentage on the cash received from the traders for advertisements, which amounted in the case of the Defendants *Evans* to 65 per cent. and 62½ per cent. respectively; they being liable by their agreements to furnish the Plaintiff with all blocks and translations required for the advertisements free of charge.

These agreements came to an end in April, 1892.

Shortly afterwards, the Defendants *Evans* became connected with a publication called the "Commercial Directory," and assisted in getting up and adding thereto a Continental section, which the Plaintiff alleged to be an infringement of his copyright. The owner and registered proprietor of this rival publication was a Mrs. *Raper*, who was proceeding to sell and assign her rights therein to a limited company, called "*Harrison & Co.*," who, with Mrs. *Raper*, had employed printers, Messrs. *Miller, Son & Co.*, to print specimen copies of the proposed rival publication; the "copy" from which these specimen copies were produced consisted of printed portions, cut out of the Plaintiff's work, with the addition of written matter supplied by the Defendants *Evans*, with the result that these specimen copies were almost a *verbatim* reprint of the Plaintiff's Continental Section.

The Plaintiff commenced the present action against the *Evanses*, Mrs. *Raper*, *Harrison & Co.*, and Messrs. *Miller, Son & Co.*, and now moved for an interim injunction to restrain the Defendants

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Evans from selling or communicating to the Defendants *Raper* and *Harrison & Co.*, and the Defendants *Raper* and *Harrison & Co.* from publishing or using for the purposes of the "Commercial Directory," and the Defendants *Miller, Son & Co.* from printing or copying, any copies or blocks of advertisements or trade-marks procured by, or then or late in the possession of, the Defendants *Evans*, as agents of the Plaintiff, or any advertisements copied from, or only colourably differing from, any of the advertisements in the Plaintiff's publication, and from otherwise infringing the Plaintiff's copyright therein.

The Plaintiff in his evidence stated, that the Defendants *Evans* had sold and delivered to Mrs. *Raper*, copies of advertisements and blocks in their possession belonging to the Plaintiff, and a written copy of the Continental Section of the Plaintiff's book, with additional matter collected by them while in the Plaintiff's employ, and retained by them; that from the materials thus supplied, the Defendants *Miller, Son & Co.* had printed specimen copies of the "Commercial Directory," to enable the Defendants *Evans* to proceed abroad, and canvass and collect money from the Plaintiff's Continental subscribers for advertisements in the Defendants' publication; and that this would cause him loss and damage; because, on discovering that deception had been practised on them by his former agents, they would not in future pay their subscriptions, or give orders, to his agents. Further, that the Defendants *Evans* had obtained the blocks and woodcuts for the advertisements solely for the purposes of the Plaintiff's book; that the advertisers looked to him for the return of these blocks and woodcuts, as being their property, and for being used only for the purposes of the Plaintiff's book; and that he had demanded from the Defendants *Evans* the delivery over to him of all such blocks and woodcuts; but that they had refused to give them up.

Byrne, Q.C., and *Morshead*, for the Plaintiff:—

Our case is, first, breach of contract by the Defendants *Evans* in using for a rival publication materials and information which they obtained as the Plaintiff's agents. It must be taken to be a term of their employment that, so far as such information

was the subject of copyright, it should belong to the Plaintiff. Secondly, breach of copyright, in taking part of the Plaintiff's book and publishing it *verbatim* as their own, without going for information to the parties from whom such information was originally obtained: *Morris* v. *Wright* (1); *Maple & Co.* v. *Junior Army and Navy Stores* (2). We lay special claim to the headings and arrangement which the Defendants have copied; the fact that our book is a collection of advertisements does not deprive us of the benefits of the *Copyright Act* (5 & 6 Vict. c. 45); that seems clear from *Maple & Co.* v. *Junior Army and Navy Stores.* The Defendants have no right to take portions of our book and print them in their own: *Morris* v. *Ashbee* (3).

Farwell, Q.C., and *Ribton*, for the Defendants *Evans* and for *Harrison & Co.*:—

We are entitled to take these advertisements, which were composed by the advertisers with the assistance of the Defendants *Evans*, and print them in our publication. Auctioneers or other advertisers who send their advertisement to the *Times* for insertion cannot prevent any other newspaper from copying them; and in the present case the headings and translations were not composed on the terms that the copyright therein should belong to the Plaintiff within 5 & 6 Vict. c. 45, s. 18; before any one can sue for an alleged piracy of any such composition, he must prove not merely that the author has been paid for his services, but that the article was composed on the terms that it should be the copyright of the proprietor of the periodical: *Walter* v. *Howe* (4). There can be no copyright in advertisements, and the case is not within the exception of *Morris* v. *Ashbee*; the advertisers are at liberty to insert these same advertisements in our publication. *Maple & Co.* v. *Junior Army and Navy Stores* is distinguishable. The blocks, copies of trade-marks, and other materials, are not the property of the Plaintiff, but of the different traders who have supplied them, and who have paid the Plaintiff for inserting their advertisements in his book.

(1) Law Rep. 5 Ch. 279.
(2) 21 Ch. D. 369.
(3) Law Rep. 7 Eq. 34.
(4) 17 Ch. D. 708.

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Levett, Q.C., and *Medd*, for the Defendants, *Miller, Son & Co.*, the printers, submitted to act as the Court should direct.

Dunham, for Mrs. *Raper*, contended that she was not a necessary party; but the argument and judgment on this point do not call for any detailed report.

Byrne, in reply:—

No one has a right to reprint this book as it now is, and sell it as his own; there is copyright in the headings and general arrangement, and the fact that numerous traders have paid for the insertion of their advertisements makes no difference to the Plaintiff's copyright, as it is the profit from the sale of this book which is to be protected.

Aug. 12. CHITTY, J. (after stating the facts and observing that for the purposes of the present judgment he should divide the Continental Section of the Plaintiff's work into two parts—the headings, and that which was to be found under the headings—continued):—

Two points are presented on the part of the Plaintiff. One is copyright. The Plaintiff unquestionably is the proprietor of the copyright of this book, so far as he can have copyright in anything, and I think that he has established his copyright in the headings. A man may have copyright in a part of a book although the whole of the book is not protected. That was shewn, if authority is wanted, in *Maple & Co.* v. *Junior Army and Navy Stores* (1), where the illustrations in *Maple's* catalogue were treated in the Court of Appeal, as well as by the Vice-Chancellor, as a legitimate subject of copyright, although they were contained in a book which as to letterpress consisted of a catalogue of the goods offered by *Maple* for sale. The illustrations were held to be part of the book, and consequently so far as related to the illustrations Mr. *Maple's* rights were enforced as against the defendants who copied the illustrations. To the extent which I have mentioned, namely, as to the headings, I think the Plaintiff has copyright; but in regard to the advertise-

(1) 21 Ch. D. 369.

ments themselves, as at present advised, I am unable to see how the Plaintiff can claim copyright. I will take a simple illustration. In the *Times*, or any other of the leading newspapers of the day, one may see a sheet which, in the language of the *Copyright Act*, if a sheet of letterpress, is a book, consisting entirely of advertisements. There may be the ordinary headings, such as "Houses to Let," "Situations Wanted," and the like. Has the newspaper copyright in those advertisements? Clearly not. If it had, there would be this extraordinary result, that, assuming of course that one of that particular day's issue was registered, the advertisers could not advertise in any other newspaper. No one would take the sheet and print the sheet just as it was, putting the name of the *Times*, *Standard*, or *Daily News*, or any other paper, at the top; that would be infringing another right of the proprietor of the paper, namely, his right to trade name. But so far as there is any copyright in the advertisements themselves, that copyright must of necessity remain vested in the advertiser. If one may use the term "composition" with regard to so humble a literary work as that, the advertisement is the work of the brain and "the composition" of the advertiser. On this point it appears to me to make no difference whether the person who inserts the advertisement of another in any periodical, goes to the person likely to advertise and touts for advertisements, or whether the advertiser comes, as is the case in the case of the daily newspapers, direct to the office of the newspaper itself. In my opinion, it makes no difference whether the newspaper invites the advertiser to come, or whether the advertiser goes to the newspaper and says, "Here is my advertisement to insert," coming of his own accord.

For these reasons, upon the facts as I understand them, I am unable to find that the Plaintiff has any copyright in the advertisements, and I say that without going into any subordinate question with reference to the extent to which the traveller assisted in the composition of the advertisements. Therefore, I am prepared to hold, for the purpose of the motion only, that the Plaintiff has a copyright in the headings which ought to be protected, but has no copyright in the advertisements themselves.

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Now I come to the second point in this somewhat intricate case. I have stated shortly the effects of the agreements with the Defendants *Evans*. The Defendants *Evans* were exclusively employed by the Plaintiff to collect the advertisements in certain districts, and in regard to the material things, such as blocks and the like, it was the duty of these Defendants to furnish the Plaintiff with them for the purposes of his work. A question is raised on the part of the Defendants, as I understand it, as to the property in these blocks and illustrations; but the Plaintiff's case is that these blocks are the property of the advertisers, though as between himself and the travellers he says that he has a special property in them, and that by the terms of the employment the travellers were bound to hand these things to the Plaintiff for the purpose of his work and to enable the Plaintiff himself to return these things to the advertisers. Of course it is obvious that it is a matter of considerable importance to the Plaintiff to be in a position to hold direct communication with the advertisers, and to prevent them unfairly falling into the hands of the intended rival publication. I mentioned during the argument a case which is unreported, so far as I know, but which has some bearing on these points. It was the case of a master tailor and his foreman cutter. The foreman cutter whilst in the employ of the master tailor cut out the ordinary patterns for the dress of his master's customers—those brown paper things which may be seen in many a tailor's shop—but being about to leave his master's service, and to set up for himself an independent business, and being desirous of attracting the custom of his master's customers, he made, whilst in the employ of the master tailor, copies of these brown paper patterns; and, setting up for himself, he took them away with him, and made use of them, by informing those whom he supposed would deal with him (his late master's customers) that he had their patterns, and he could make their clothes without putting them to the trouble of attending to be measured again. The master tailor obtained an injunction against him for using this, which, in substance, was information obtained by him exclusively for the benefit of the master while in the master's employment.

As well as I could make out from the evidence, the Defendants *Evans* have retained some of these blocks and other materials, and also the notes which they have made during the term of their exclusive employment. In my opinion, as between the Plaintiff and the Defendants, these things could only be used wrongfully as against the Plaintiff. It is difficult to make out exactly what has been done, but I am satisfied that some wrongful use has been made. The Plaintiff gives some instances of some of these blocks and materials having been altogether kept back, and as to others his case is that they have been made use of for a purpose inconsistent with the duty of the Defendants as the Plaintiff's travellers, namely, for the purpose of the rival publication; and I think the Plaintiff has, as I understand the evidence, made out a case of that kind against his late travellers which entitles him to an injunction in a limited form, because it seems to me that the Defendants *Evans* in some way or other, which is not altogether very clear, are intending to give assistance to a rival publication, and assistance by means of the blocks and other materials to which I have already referred. [His Lordship having referred to the way in which the specimen copies produced by the printers had been prepared, continued:—]

So far as these specimen copies consist simply of reprinting of the Plaintiff's advertisements, for the present purposes I absolve the Defendants altogether on any question of copyright; but so far as the Defendants *Evans* have been making use wrongfully as against the Plaintiff of the materials in their possession, collected for the purposes of the Plaintiff's work, it seems to me that the Defendants *Evans*, and those who in this action are claiming under them and with them, are in the wrong.

The result is plain as to the copyright; but it is by no means an easy thing to frame a proper injunction in regard to these other matters. The travellers may unquestionably take the Plaintiff's book and go round with it to these traders whose advertisements they hope to obtain for the rival work, of course making no misrepresentations; and they say that they do not intend to make any misrepresentations, although the Plaintiff

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by his evidence suggests that the traders will be misled, because the old travellers of the Plaintiff will go to them and will have something which is exactly like that which they got those same travellers to put into the Plaintiff's book. But I consider that that would be a legitimate use of the Plaintiff's work. To take, however, this bulky volume with them would be somewhat to impede the motion of these travellers, and I have no hesitation in saying they would not be committing any breach of duty if they took a page, or took therefrom an extract, when canvassing. To use the popular expression, they may go and legitimately tout for advertisements for the rival production, and legitimately use the Plaintiff's work for the purpose of discovering the traders and shewing them the kind of advertisement these same traders formerly approved of, and may be desirous of inserting in the rival work. The law has been thus expounded with reference to directories proper. This book, as I have already said, is not a directory simple and proper. It does not give a list of the streets, with the names of the persons who can be found there. The Defendants however, though they may do this, are not at liberty to copy for any purpose—not even for the purpose of the specimen copies as they call them—so much of the Plaintiff's work as that in which the Plaintiff has copyright.

[After some discussion an injunction in the following terms was granted, restraining all the Defendants (other than the printers), their servants and agents, "from printing, selling, or publishing any copy or copies of so much of the Plaintiff's book in the writ mentioned as consists of headings (not forming part of advertisements therein), so or in such a way as to infringe the Plaintiff's copyright in such headings"; and further, "from displaying or using for the purpose of obtaining advertisements for any work other than the Plaintiff's said work so much of the copies of the Defendants' book already printed as consists of such headings as aforesaid, and from using blocks or materials obtained by the Defendants (*Evans*) or either of them, whilst in the employment of the Plaintiff, and for the purposes of his said work, or any copies thereof for the purposes of any work other

than the Plaintiff's. But this order is not to extend to prevent the Defendants, or any of them, making legitimate use of the Plaintiff's work, or any part thereof, for the purposes of obtaining advertisements or otherwise."

No injunction was granted against the printers, on their undertaking not to infringe the Plaintiff's copyright in the headings of his work, and for that purpose to destroy the translations of all such headings. And they were to be at liberty to deliver the specimen copies, with the headings destroyed as aforesaid, to the Defendants or any of them, to be held by them subject to the terms of the order.]

Solicitors: *C. J. Rawlinson; Rye & Eyre; Maples, Teesdale & Co.; Judge & Priestley.*

W. C. D.

NORTH, J. *In re* CARTER MEDICINE COMPANY'S TRADE-MARK.

1892
June 3.

Patents, Designs, and Trade Marks Acts, 1883 *to* 1888, *ss.* 64, 103—*Foreign Trade-mark—International Convention.*

Sect. 103 of the *Patents, Designs and Trade Marks Acts*, 1883 to 1888, does not authorize the registration of a trade-mark outside the definition of a trade-mark given by sect. 64.

THIS was a motion on the part of the *Carter Medicine Company*, a company incorporated under the law of the State of *New York*, having its principal place of business in *New York*, that the Comptroller-General might be directed to proceed with an application (No. 162,193) to register a trade-mark in the name of the *Carter Medicine Company*. The application to register was made under sect. 103 of the *Patents, Designs, and Trade Marks Acts*, 1883–1885 (1).

(1) The material part of sect. 103 of the *Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), as amended by the *Patents, Designs, and Trade Marks Act*, 1885 (48 & 49 Vict. c. 63), s. 6, is as follows:—

"(1.) If Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of inventions, designs, and trade-marks, or any of them, then any person who has applied for protection for any invention, design, or trade-mark in any such State, shall be entitled to a patent for his invention or to registration of his design or trade-mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the application in such foreign State. Provided that his application is made, in the case of a patent within seven months, and, in the case of a design or trade-mark, within four months, from his applying for protection in the foreign State with which the arrangement is in force. Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade-mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade-mark in this country, as the case may be. . . . (3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade-mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade-marks, any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act. (4.) The provisions of this section shall apply only in the case of those foreign States with respect to which her Majesty

The application to register was dated the 28th of January, 1892. The trade-mark sought to be registered consisted of the words, printed in plain block type, "*Carter's Little Liver Pills.*" The application stated, "The essential particulars of the trade-mark are the following, the words '*Little Liver,*' and the Applicants disclaim any right to the exclusive use of the word '*Pills.*'"

The Comptroller refused the application. The Applicants appealed to the Board of Trade, and the Board of Trade directed the application to be referred to the Court. The present motion was made in pursuance of such direction.

The trade-mark in question was registered in the name of the Applicants on the 17th of November, 1891, in the *United States* Patent Office, in pursuance of an application filed on the 19th of October, 1891. The application was accompanied by a declaration and statement, a part of which was as follows:—

"The said words '*Carter's*' and '*Pills*' do not, however, form an essential part of our trade-mark, the essential feature of which resides in the fanciful title or designation '*Little Liver,*' which term indicates to the public the origin and ownership of goods of our manufacture.

"This trade-mark has been continuously used by said corporation since about February, 1877."

On the 20th of March, 1883, an International Convention for the Protection of Industrial Property was signed in *Paris* on behalf of *France, Belgium,* and other States, not including the *United Kingdom* or the *United States.* It contained a provision that other States should be permitted to adhere to the Convention at their request (1). The plenipotentiaries of the contracting

shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each State as the Order in Council shall continue in force with respect to that State."

The amendment consisted of substituting the words "date of the application," now in sub-sect. 1, for the words "date of the protection obtained," in the Act as passed in 1883.

(1) The following is the text of the official translation of Articles II., IV., and VI. of the Convention:—

"II. The subjects or citizens of each of the contracting States shall, in all the other States of the Union, as

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States at the time of signing the Convention also signed a protocol, which it was declared should have the same force and solidity as the Convention (1).

On the 17th of March, 1884, the Convention and protocol were acceded to by the British Government.

By an Order in Council, dated the 12th of July, 1887, it was declared that the provisions of sect. 103 of the *Patents, Designs,*

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regards patents, industrial designs or models, trade-marks and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens. Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each State. IV. Any person who has duly applied for a patent, industrial design or model, or trade-mark in one of the contracting States, shall enjoy, as regards registration in the other States, and reserving the rights of third parties, a right of priority during the periods hereinafter stated. Consequently, subsequent registration in any of the other States of the Union before expiry of these periods shall not be invalidated through any acts accomplished in the interval: either, for instance, by another registration, by publication of the invention, or by the working of it by a third party.... The above-mentioned terms of priority shall be six months for patents, and three months for industrial designs and models, and trade-marks. A month longer is allowed for countries beyond sea. VI. Every trade-mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the Union. That country shall be deemed the country of origin where the applicant has his chief seat of business. If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin. Registration may be refused if the object for which it is solicited is considered contrary to morality or public order."

(1) The official translation of paragraph 4 of the protocol is as follows:—

"Paragraph 1 of Article VI. is to be understood as meaning that no trade-mark shall be excluded from protection in any State of the Union, from the fact alone that it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that State; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and under reserve of the provisions of the other articles of the Convention, the internal legislation of each State remains in force. To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI."

and Trade Marks Act, 1883, should be applicable to the *United States of America*. On the 30th of July, 1887, the Convention and protocol were acceded to by the Government of the *United States of America*.

Aston, Q.C., *Moulton*, Q.C., and *Fothergill*, for the Applicants :—

The Convention and protocol provide that a trade-mark protected by registration in the country of origin, when that country is within the Convention, shall be given the same protection by registration in any other country within the Convention. And it matters not whether such trade-mark can or cannot be registered in the latter country as the country of origin of the trade-mark.

It is true that the rights of the Applicants in this country depend entirely on the Act of Parliament. But, as we submit, the Convention may be looked at for the purpose of seeing what was the object to be gained. What was the evil to be cured by passing sect. 103, a point to be looked at in construing the section? The reasonable construction to put on that section is that a person who has applied for and obtained protection in a foreign State may, under a convention made by Her Majesty, obtain protection in *England* by applying for registration. The test is whether the trade-mark is protected in the foreign country. It may be that the proviso at the end of sub-sect. 3 is to be confined to trade-marks capable of registration, or, if necessary, to trade-marks actually registered in the country of origin. Where a trade-mark had not been actually registered in the country of origin, there might in some cases be difficulty, for want of proper proof that it was capable of registration there; in such cases as this, however, the fact of registration in the country of origin supplies such proof.

Sir *R. Webster*, A.G., and *Ingle Joyce*, for the Comptroller-General :—

The question what foreign trade-marks can be registered in this country is to be determined within the four corners of the Act of Parliament: *In re Californian Fig Syrup Company's*

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Trade-mark (1). The Convention was not even in existence, so far as this country was concerned, when the Act was passed.

It is clear, all ambiguity having been removed by the Amendment Act, 1885, that a foreign trade-mark can be registered in this country (if it can be registered here at all) when application only has been made for registration in the country of origin; it matters not whether it ever was or could be registered there; it would be unreasonable if a trade-mark that an Englishman cannot register in this country could be registered here by a foreigner.

It would be still more unreasonable if, in addition, it could not be registered in its country of origin: that would be the effect of reading the section to apply to trade-marks not otherwise within the Act. The real meaning of the section is that a foreign trade-mark, as defined by sect. 64 of the Act and no other, may be protected by registration here. The Applicants' trade-mark, consisting as it does of descriptive words, is not a trade-mark within the Act. The decision of the Comptroller is, therefore, right. The Board of Trade, however, consider the public would be sufficiently protected by the Applicants disclaiming a right to the exclusive use of the words "*Little*" and "*Liver*" in addition to the word "*Pills*," and, without admitting any right on the part of the Applicants, will not oppose registration with such disclaimer.

Aston, in reply.

NORTH, J.:—

In my opinion this application is not well founded. The difficulty in the case, for I think there is some difficulty in it, arises from the proviso which forms the latter portion of the 3rd sub-section of sect. 103 of the Act of 1883. At that time negotiations were going on with a view to a mutual arrangement between different countries, and I do not think it is wrong to refer as a matter of history to what was going on at that time for the purpose of understanding the position in which matters stood, although in my opinion it would be wrong to refer thereto

(1) 40 Ch. D. 620.

for the purpose of construing the Act of Parliament; which is the only thing which can guide the Comptroller in this case, and can guide me in giving directions to him.

In the year 1883 certain negotiations were taking place with reference to obtaining mutual protection in different countries as to patents, designs, and trade-marks, and a Convention was arrived at between several countries, of which *Great Britain* was not one. [After referring to the scope of Articles IV. and VI. of the Convention, His Lordship proceeded:—] It was only in March, 1884, that the Government of this country acceded to that Convention, and it was not until the year 1887 that the Government of the *United States* did so.

In the meantime, when this Convention was the subject of negotiation, but nothing had been settled so far as this country was concerned, in anticipation of some arrangement being arrived at the 103rd section was inserted in the Act passed in 1883. That section began by providing, "If Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of inventions, designs, and trade-marks, or any of them," then certain consequences were to follow; and those consequences were not such as to provide for all possible arrangements that might be made in future; but dealt with one particular matter as to which no doubt an evil had arisen; that evil being this, that a person was as the law then stood entitled to obtain a patent in this country and in some other countries as being the first inventor of something which he had not invented at all, but which he had merely picked up in another country and brought over here; and was the first to apply here for a patent for it. The result was that a person applying in *America* for a patent had not only to obtain a patent there, but to take proceedings to secure his rights here at the very first moment, before any person in *America* could obtain information as to the nature of his invention. Many a person obtained a patent in one country and failed to get it in others because he had been anticipated there by persons who used greater expedition, but who had no merits of their own. Then the Act goes on to provide that if any such future arrangements for mutual protection are made, then any person who has—what?—

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"applied for protection for any invention, design, or trade-mark shall be entitled to a patent for his invention or to registration of his design or trade-mark (as the case may be) under this Act in priority to other applicants"—it does not mean, therefore, that he is to be entitled out and out to registration, but that what is secured to him is priority over other applicants—"and such patent or registration shall have the same date as the date of the protection obtained in such foreign State." That is how the words were originally written. Then it proceeded: "Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade-mark within four months, from his applying for protection in the foreign State with which the arrangement is in force." It is obvious that this section was not happily expressed, because in one place application for protection was referred to, whereas in the other "protection obtained" was referred to. The inconsistency was corrected by the Act of 1885 by substituting for the words "date of the protection obtained" in the first portion of that section the words "the date of application in such foreign State." Then it provided: "Nothing in this section contained shall entitle the patentee or proprietor of the design or trade-mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade-mark in this country, as the case may be," making there a clear and marked distinction between his right as an applicant to obtain registration of a trade-mark and his right after he has obtained the actual registration. Then the 2nd sub-section goes on to deal with the periods aforesaid, and provides that publication or description or use of the patent, design, or trade-mark during such periods shall not invalidate the patent, or the registration of the design or trade-mark, dealing again with the interval between the application for it and the granting or registration of it. Then we come to the 3rd sub-section: "The application for the grant of a patent, or the registration of a design, or the registration of a trade-mark under this section, must be made in the same manner as an ordinary application under this Act"; that is to say, certain rules and forms being provided, an application to register what

may be called a foreign patent or trade-mark, must be made in precisely the same way as the application as to an English patent or trade-mark. Now, it seems to me clear that what is here dealt with relates to applications for patents and priority of application, but does not touch in any way the position of the parties after the grant or registration has taken place. Then come these words: "Provided that, in the case of trade-marks, any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act." Now, there are three things which might have been met by the proviso. One is what the Attorney-General says is the meaning of this clause: "Any trade-mark, the registration of which has been duly applied for in the country of origin, may be the subject of application for registration under this Act." That is exactly what one might have expected, that where there has been an application in one country there may be an application in the other. Another mode of reading it is what Mr. *Aston* suggests by putting in the word "registered," and reading it "any registered trade-mark." Then it would have run in this way: "Provided that, in the case of trade-marks, any registered trade-mark"—"any trade-mark registered in the country of origin"—"may be registered under this Act." There, again, there is mutual protection common to both countries; either the application in the one country is to authorize the application in the other, or a registration in the one is to authorize registration in the other. But, then, there is an intermediate phrase used here, "any trade-mark, the registration of which has been duly applied for in the country of origin, may be registered under this Act"; and this is said to mean that any mark for which a man thinks fit to apply in *America* must necessarily be registered here, even though the mark could not by law, and the applicant knew all along that it could not, be registered in *America*. It is admitted that the word "*Pills*" alone could not be registered as a trade-mark in *America*: but it is said that an application in *America* to register that word as a trade-mark there, which the Applicant knew must fail, would entitle him to have that word registered as his trade-mark here, with all the consequences flowing from it. That is what Mr. *Aston* calls mutual protection. It would not be

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anything of the kind. That would be such an absurd result that it is clear to me that that cannot be the meaning of the words used. Then we have to choose between the view put by the Attorney-General on the one side and the view put by Mr. *Aston* on the other. I cannot read the sentence as meaning "any registered trade-marks," which is Mr. *Aston's* view; for this sub-sect. (3) is dealing—not with registered trade-marks—but trade-marks for the registration of which application is being made: and, more than that, I should be striking out of the Act altogether "the registration of which has been duly applied for in the country of origin." If the words were "any registered trade-mark," what would be the use of putting in the words "the registration of which has been duly applied for in the country of origin"? That would be past history, and whether it had been duly applied for would not matter, because the registration would be conclusive.

Then Mr. *Aston* points out that under the words of the section as they stand one has to find out whether there has been a due application in the country of origin for a registration, and for that purpose we must ascertain what the law of that country is, and find out what, according to the law and the procedure of the country in question, would be a due application for registration, and then we are to grant registration here according to whether the forms of procedure of that country have or have not been duly followed: whereas if the word registered is inserted we need not inquire what the law is in *America*: the best test of what the law there is is that this trade-mark was duly applied for because it has been registered. That is an accident. This section applies not only to where there has been foreign registration, but also to where there has not, and only an application has been made; and I cannot remodel the section to suit the circumstances or accede to the application made.

Then the question is, in what form any order should be made, because the Attorney-General was disposed to make some concession, and not to object to a registration subject to a qualification which he laid down. I do not see my way to adopting what he suggested as part of the Order of the Court, because I am not satisfied myself that such a form would be right, and

if it would not be right I ought not to establish a precedent which might be followed. I do not mean now to decide that it would be wrong. I think that the best course is not to sanction such registration as the Attorney-General was prepared to accede to, but to refuse the application altogether, and to leave the parties to make any other application they may think fit.

Solicitors for the Applicants: *Paddison, Son, & Fullilove.*

Solicitor for the Comptroller-General: *Solicitor to Board of Trade.*

D. P.

NORTH, J.
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June 30; July 5.

In re PORTER. COULSON *v.* CAPPER.

[1891 P. 114.]

Will—Construction—Forfeiture Clause—Validity—Repugnancy — Forfeiture on Assigning or attempting to Assign — Assignment inoperative independently of Forfeiture Clause.

A testator by his will gave the residue of his estate to trustees, on trust to pay an annuity of £50 to his widow in case she should marry again (which she did) during her life, and subject thereto to pay the income to his two sisters, in equal shares, during their lives, and to pay the whole to the survivor during the remainder of her life, and after her death to divide the fund equally between the testator's nephews and nieces, to be paid to them at twenty-one, the share or shares of any of them dying under that age leaving issue to go to such issue, and the share or shares of any of them dying under that age without leaving issue, or leaving issue in case such issue should all die under twenty-one, to go to the testator's surviving nephews and nieces, and to the issue (if any) of such of them as should be then dead, such issue to represent their respective parents, and to take equally amongst them, if more than one, and, if but one, such one only, the same share as his, her, or their deceased parent would have taken if he or she had then been living and had been a surviving nephew or niece. And the testator declared that if any of his nephews or nieces should, during the lives of his two sisters or the survivor of them, assign his or her expectant share, or any portion thereof, or should attempt so to do, then he or she so assigning his or her expectant share, or any portion thereof, or attempting so to do, should forfeit all benefit under the testator's will; and the assignment, so far as it should purport to affect any part of the trust moneys, should be null and void, and the share of the person so assigning, or attempting so to do, should go, as if he or she had never been born, to the other nephews or nieces. The survivor of the testator's two sisters died in 1890. In 1876 one of the testator's nieces, who had attained

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twenty-one, married in *Australia* a domiciled Australian. No settlement was made on her marriage; but in 1879 she and her husband executed a post-nuptial settlement, which purported to assign (*inter alia*) her reversionary interest under the will of the testator to trustees upon certain trusts. By the law of *Australia* this assignment was inoperative except to the extent of the husband's interest (if any) in the wife's reversionary share:—

Held, (1.) that the forfeiture clause was valid notwithstanding that the reversionary interests were originally vested but liable to be divested; (2.) that, although the settlement was inoperative as regarded the wife, it was, within the meaning of the clause, an attempt to assign her reversionary share, and that the forfeiture had taken effect.

FURTHER CONSIDERATION of an originating summons.

William Porter, by his will, dated the 6th of May, 1850, devised and bequeathed all his real and personal estate to *John Coulson*, *Richard Godwin*, and *W. J. Fox*, their heirs, executors, administrators, and assigns, upon trusts for sale and conversion, and payment of his debts, and to invest the residue as therein mentioned, and to pay and apply the income thereof unto or for the benefit of his wife, *Mary Porter*, during her life, or so long as she should continue his widow, and, subject as aforesaid, upon the trusts therein declared for the benefit of the testator's issue as therein mentioned. And the testator declared that, in case there should be a total failure of issue of his body, in case his wife should after, but not previous to such failure of issue, marry again, his trustees should pay to her an annuity of £50 during the remainder of her life. And, subject to the limitations aforesaid, the testator directed that his trustees should pay and apply the income of his estate unto and for the benefit of his two sisters, *Hannah Bentley* and *Sarah Bakewell*, in equal proportions during their lives; and after the death of either of them, whether she should have left issue or not, in trust to pay the whole of the income of his estate unto or for the benefit of his surviving sister, during the then remainder of her life, and after the death of his surviving sister, upon trust, subject as aforesaid, to pay and divide all the said trust moneys unto and between all the children (if any) of his said two sisters, and all other his nephews and nieces whatsoever, equally share and share alike, to be paid and payable to them at the age of twenty-one, the share or shares of any of them dying under that age leaving lawful

issue to go to such issue, and the share or shares of any of them dying under that age without leaving such lawful issue, or leaving such in case such issue should all die under twenty-one, to go to the testator's surviving nephews and nieces, and to the issue (if any) of such of them as should be then dead, such issue to represent their respective parents, and to take equally amongst them, if more than one, and, if but one, then such one only, the same share in the trust moneys as his, her, or their deceased parent would have taken if he or she had then been living and had been a surviving nephew or niece, and all surviving or accruing shares to be subject to the same conditions of accruer, survivorship, and division as thereinbefore mentioned, concerning the original portions of any of his said nephews and nieces respectively. And the testator declared that, in case any of his nephews or nieces whatsoever, or any of their children or issue, should, during the lives of his said sisters or the survivor of them, sell, mortgage, assign, charge, or otherwise dispose of (save by his or her will or codicil, or by some writing in the nature thereof which should be revocable) his or her expectant share of or in the said trust moneys, or any portion thereof, or any beneficial estate or interest therein or in respect thereof, or should attempt so to do, then and in such case he, she, or they so selling, mortgaging, assigning, charging, or otherwise disposing, or attempting so to do, of his or her expectant share of the said trust moneys, or any portion thereof, or any estate or interest therein or in respect thereof, should forfeit and lose all benefit under his will, and the sale, mortgage, assignment, charge, or other disposition, so far as the same should purport to affect any part of the said trust moneys, or any interest therein, should be utterly null and void, and the share and interest of the person or persons so selling, mortgaging, assigning, charging, or otherwise disposing of the said trust moneys, or attempting so to do, should go, in such and the like manner as if he, she, or they had never been born, to his other nephews and nieces, or their respective issue.

The testator died on the 27th of June, 1851. He left no issue. His widow married again. *Hannah Bentley* died on the 20th of May, 1878; *Sarah Bakewell* died on the 30th of September,

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1890. On the 13th May, 1891, *John Coulson*, the surviving trustee of the will, took out this summons. The Defendants were *J. P. Capper*, and *John Anderson* and *Mary Ellen* his wife, who claimed to be interested in the residuary estate of the testator. The object of the summons was to have it ascertained who, in the events which had happened, were entitled to the residuary estate of the testator, and in what shares and proportions. Upon the hearing of the summons it was ordered that certain inquiries should be made in Chambers.

The Chief Clerk, by his certificate, in answer to the inquiries, found that the testator had two nephews and three nieces, who survived him—viz., *Thomas Porter Garle*, who died on the 7th of April, 1875; *Ann Porter Cawley*, the wife of *William Cawley*, who died on the 5th of June, 1888; the Defendant *Mary Ellen Anderson*; the Defendant *J. P. Capper*; and *Agnes Ann Sullivan*, the wife of *Henry Sullivan*. The personal representative of *T. P. Garle* was *Catherine Squires*, the wife of *George Squires*. None of the said nephews and nieces died under twenty-one, and none of them had made any mortgage, assignment, charge, or disposition (otherwise than by will or codicil) of their, his, or her shares or share of or in the trust moneys held upon the trusts of the will; or had attempted to make any such mortgage, assignment, charge, or disposition, except that Mrs. *Cawley* had, by a settlement made on the 31st of March, 1853, prior to her marriage, assigned to trustees all her share under the will of the testator, upon the trusts therein declared, and that Mrs. *Sullivan*, who married *Henry Sullivan* in *South Australia* on the 10th of February, 1876, had executed a post-nuptial settlement on the 15th of March, 1879, purporting to assign to trustees (*inter alia*) her share under the will of the testator. *Sullivan* was domiciled in *Australia*. The Chief Clerk submitted to the judgment of the Court whether the settlement of the 15th of March, 1879, was an assignment or disposition, or attempted assignment or disposition, of Mrs. *Sullivan's* share.

There was evidence that by the law of *South Australia* the post-nuptial settlement executed by Mrs. *Sullivan* was not binding on her as regarded her reversionary interest under the will of the testator, though it did bind her husband.

Borthwick, for the Plaintiff, stated the facts.

R. J. Parker, for the Defendant *Capper*:—

A forfeiture of Mrs. *Sullivan's* share has taken place. She has, by the settlement, attempted to assign it, and it is immaterial whether the deed had or had not any legal effect independently of the proviso: *In re Wormald* (1).

The proviso is limited to the life of the surviving tenant for life, and there is, therefore, no objection to its validity.

Oswald, for the Defendants Mr. and Mrs. *Anderson*:—

There has, within the meaning of the clause, been an attempt by Mrs. *Sullivan* to alienate her share, and it is forfeited: *Stephens* v. *James* (2); *Wilkinson* v. *Wilkinson* (3).

That the forfeiture clause is valid is shewn by *Kearsley* v. *Woodcock* (4) and *In re Payne* (5).

Warrington, for Mrs. *Sullivan* and the trustees of her settlement:—

(1.) Mrs. *Sullivan's* husband was domiciled in *Australia* at the date of the settlement, and consequently that was her domicil. The evidence shews that, by the law of *Australia* at that date, the assignment by a married woman of her reversionary share of personal estate was inoperative. The settlement only affected such interest as the husband might have in the share. The settlement was not, therefore, an assignment by Mrs. *Sullivan* of her share, nor was it an "attempt" to assign within the meaning of the clause. In construing clauses of forfeiture the Court always has regard to the general intention of the testator—viz., that the object of his bounty shall personally enjoy it. With this view words of futurity have been construed as extending to an existing bankruptcy. An "attempt to assign" means the doing of something which, but for the forfeiture clause, would operate to deprive the legatee of the personal enjoyment of the gift. In the present case, independently of the forfeiture clause, the settlement could have no effect at all: *Stephens* v. *James*. The assignment

(1) 43 Ch. D. 630.
(2) 4 Sim. 499.
(3) 3 Swans. 515, 527.
(4) 3 Hare, 185.
(5) 25 Beav. 556.

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had no effect at all quite irrespectively of the forfeiture clause; it was void at law by reason of the assignor being a married woman. The clause says that the assignment "shall be null and void." It is null and void independently of the clause: *In re Wormald* (1).

[NORTH, J.:—In that case the word "attempt" was not in the clause: *Martin* v. *Margham* (2).]

(2.) The clause of forfeiture is annexed to a vested gift of personal estate in remainder, and it is void in law as being repugnant to the gift. In all the cases (except *Kearsley* v. *Woodcock* (3), which was decided without much argument) in which a condition of forfeiture has been held valid as applied to a gift in remainder the interest has been contingent. *Churchill* v. *Marks* (4) is an instance. *In re Rosher* (5) shews that the clause is void.

[NORTH, J., referred to *In re Arrowsmith's Trusts* (6).]

Oswald, in reply, referred to *Reg.* v. *Brown* (7).

NORTH, J.:—

In my opinion, that which the testator contemplated by his will as possible has been done by Mrs. *Sullivan*, and therefore the proviso for divesting her share has operated.

[His Lordship read the gift in the will to the testator's nephews and nieces, and continued:—]

Now, if that were the whole of the will, there would be a gift in remainder to the nephews and nieces, vested at birth and payable at twenty-one, but subject to the preceding life estates, and liable to be divested by death under twenty-one. Those life estates have now come to an end, and Mrs. *Sullivan*, one of the persons who, if there were no other clause in the will, would have taken under the words which I have read, asks for her share. The will, however, contains a clause of forfeiture.

[His Lordship read the clause, and continued:—]

(1) 43 Ch. D. 630.
(2) 14 Sim. 230.
(3) 3 Hare, 185.
(4) 1 Coll. 441.
(5) 26 Ch. D. 801.
(6) 2 D. F. & J. 474.
(7) 24 Q. B. D. 357.

Now what happened was this. Mrs. *Sullivan* married a gentleman who was domiciled in *Australia*. No settlement was made upon the marriage, and, in my opinion, the marriage was not "an assignment" within the meaning of the clause. But, after the marriage, she and her husband made a settlement of her share, settling it in effect, as I understand, upon herself for life, with remainder to her children. The settlement was made in 1879, during the life of one of the two sisters of the testator. That settlement did not take effect in law as an assignment of her share, because, though it was duly executed by her, the law of the country in which she was living and domiciled at the time did not allow of such a disposition being effectually made by a married woman, the law there being apparently the same as it was in this country forty years ago. The argument is, that, because she did not assign her share, inasmuch as she could not legally assign it, therefore she in effect did nothing by the deed, and has not forfeited her interest under the will. I could have followed that argument if the words "or attempt so to do" had been omitted from the will. But those words are there, and I do not see how I can reject them or strike them out. "Assigning" is one thing, "attempting to assign" is another, and the will clearly contemplates a difference between the two, because it deals first with "assigning," and, secondly, with "attempting to assign," which cannot mean assigning, because that is covered by the first words. "Attempting to assign" must mean doing something which is not an assignment. The forfeiture, therefore, is to be either on assigning, or, without assigning, on attempting to assign. It seems to me clear that this settlement was an "attempt to assign," and, unless I reject those words altogether, I must treat it as producing the result which the testator intended not to allow.

There are a great many cases to be found in the reports bearing on the subject. Mr. *Warrington* cited *Churchill* v. *Marks* (1), which he attempted to distinguish from the present case, on the ground that the subject of the assignment there was at the date of the assignment contingent, and not vested, because it was a share of one of several children under a gift to such of the

(1) 1 Coll. 441.

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children of the tenant for life as should be living at the time when the youngest child should attain twenty-one. One of the children became insolvent during the life of the tenant for life, and before the youngest child had attained twenty-one. It could not be said of the insolvent at the date of the vesting order that he would be living at the time when the youngest attained twenty-one, for that time had not yet come. Therefore it was said his interest was contingent, not vested—that is, in one event it might take effect; in the other, he would take nothing. By the vesting order all that he had, including what was coming to him at a future time, was vested in the provisional assignee. There was a proviso that none of the children "shall be allowed or shall ever sell or part with his or her share or interest in this said money until it shall be divided." It was held that the clause of forfeiture applied, though what was dealt with there was not an absolutely vested share, but a vested share subject to be divested. I cannot see that there is any distinction in principle between a contingent share and a share which is vested, but is liable to be divested. I quite understand the difference between the two; but I do not see any principle upon which I can say that the clause of forfeiture in the present will cannot legally apply to a vested share subject to divesting, although it would apply to a contingent share. There are a great many cases in which the Court has recognised the legality of a legacy given absolutely with a proviso that, in case the legatee should die before the legacy should become payable, a gift over should take effect. No doubt in some of those cases there has been a gift to a tenant for life, and then a legacy or a share of residue has been given subject to such a proviso. In that case the legacy would become payable on the death of the tenant for life. But when a legacy or share of residue has been given on the death of the testator, it has been held that a gift over on the death of the absolute legatee before the legacy becomes payable is perfectly good. There has been some difference in the decisions as to what "becoming payable" meant—whether it meant the end of the twelve months from the death of the testator when the executor is bound to pay a legacy, or whether it might be carried back to an earlier date within the

twelve months when there might be assets available to pay the legacy. But, in either case, if the legatee died after the death of the testator, but before the legacy became payable, the gift over has been held good. I never heard it suggested that such a gift over was repugnant. I do not see how it can be, and that class of cases appears to me to negative the argument of Mr. *Warrington* in the present case. Whether the testator would, if he had known the circumstances, have said that this bequest should be void in the events which have happened, I do not know; but I do not feel any doubt that it comes within the words used in the will.

Solicitors: *Miller, Smith, & Bell; Wilkins, Blyth & Co.; Anderson & Sons.*

W. L. C.

WALTER *v.* STEINKOPFF.

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May 13, 17; *June* 2; *July* 29.

[1892 W. 1281.]

Copyright—News—Custom to Pirate—Costs.

The form of expression in which news is conveyed is subject of copyright.

A practice by newspapers to copy from other newspapers is no defence to a copyright action.

Plaintiffs sued to restrain infringement of an important literary newspaper article and three trivial news paragraphs. The Defendants offered an undertaking with costs not to publish again the first article, refusing to undertake as to the others. The Plaintiffs proceeded with the action; they were disallowed costs subsequent to the Defendants' offer.

THE Plaintiffs in this action were two of the proprietors of the *Times* newspaper suing on behalf of themselves and their co-proprietors. The Defendants were the proprietor and publisher of the *St. James' Gazette*. The action was to restrain infringement of copyright founded on the publication of certain matter contained in the *St. James' Gazette* of the 13th of April which had appeared in the *Times* of that morning.

The most important matter complained of consisted of extracts from a long article or letter on *America* by *Rudyard Kipling*, entitled "In Sight of *Monadnock*." The *St. James' Gazette* set

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out *verbatim* half-a-dozen passages selected from the article, not quite continuously: and containing altogether just two-fifths of the whole article. Another passage in the same paper referred to the fact that the article had been written expressly for the *Times*: and that they had paid a very large price for it.

The number of the *St. James' Gazette* for the 13th of April contained also twenty-two other articles or paragraphs which were in the same language substantially as articles or paragraphs in the *Times* of that morning; they were numbered in an affidavit made on behalf of the Plaintiffs consecutively from 1 to 22. No copyright was proved or now claimed by the Plaintiffs in respect of these articles, except those numbered respectively 5, 7, and 14. They had previously paid for, and duly registered their copyright in, those three articles.

The *Times* had been previously duly registered as a periodical publication under 5 & 6 Vict. c. 45, and the copyright of the *Rudyard Kipling* article had before publication been purchased and paid for. On the 13th of April, 1892, the assignment of the copyright in that article was registered, and the copyright of the impression of the *Times* of that date was also registered. Subsequently, on the same day, the original writ in the action was issued, claiming an injunction to restrain the further publication of that article, and an *ex parte* injunction was obtained and served on that day: and the Defendants caused the article to be expunged from all copies of their newspapers subsequently issued.

Correspondence took place between the solicitors of the parties with a view to the settlement of the action on terms that the Defendants should give a perpetual undertaking and pay the costs. The terms of the undertaking could not be agreed upon. On the 22nd of April, 1892, the Plaintiffs' solicitors wrote to the Defendants' solicitors offering to limit the undertaking for which they asked to certain items of foreign news. The Defendants' solicitors were willing to give the required undertaking if limited to the *Rudyard Kipling* article; but refused to consent to any extension of the undertaking to other paragraphs. The writ was amended pursuant to an order dated the 25th of April, 1892. As amended the endorsement claimed an injunction to

restrain the Defendants from further publishing "any copy or copies of the *St. James' Gazette*, or other newspapers or newspaper containing any copy of the article which appeared in the *Times* newspaper of Wednesday, the 13th of April, 1892, entitled 'In Sight of *Monadnock*,' by *Rudyard Kipling*, or any substantial portions thereof or extracts therefrom, and from further publishing, printing, selling, delivering, or otherwise disposing of, or causing or permitting to be further published, printed, sold, delivered, or otherwise disposed of, any copy or copies of the *St. James' Gazette*, or other newspapers or newspaper containing any copy of any other article or communication, or of any letter, telegram, cablegram, or other matter which appeared in the *Times* newspaper of the said 13th of April, 1892, and of which the copyright is vested in the Plaintiffs, or any substantial portion thereof or extract therefrom." It also claimed an account and damages, and delivery up of all the remaining copies of newspapers containing pirated articles.

The injunction, which had been obtained *ex parte*, was continued till the 26th of April. On that day the Defendants gave an undertaking not to further publish the *Rudyard Kipling* article.

The action was now brought on on motion for an interim injunction in terms of the amended endorsement on the writ. The hearing of the motion was by arrangement treated as the trial.

The Defendants put in evidence to justify their having made the extracts complained of. It was alleged that since the establishment of the *St. James' Gazette* in 1880, it had been the practice of that newspaper to print extracts from other newspapers without complaint. The Defendants set up a practice among newspapers generally to act in that manner, and alleged that the practice had been acquiesced in and acted on by the managers of the *Times*.

As to the existence of the alleged custom, among other affidavits by persons connected with the press, was one by Mr. *Low*, the editor of the *St. James' Gazette*, containing the following words:—

"It is a well-recognised rule in journalism, and one upon which the *Times* itself has frequently acted (and I will give specific

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instances where the *Times* has acted on the rule), not to ask for permission to make the extracts or quotations above referred to, and I believe it to be the universal mutual understanding of journalists, which I have no doubt whatever is continually assumed and acted upon, that the consent of the proprietors of papers from which matters or paragraphs of news are quoted or copied may be taken for granted if the following conditions are complied with: (1.) If the source of the quotations or information is acknowledged. (2.) If the paper copying or the paper copied from are not direct rivals or competitors, as would be the case, for instance, with two evening papers appearing in the same town, which is not the case with the *Times* and the *St. James' Gazette*, the former of which appears very early in the morning, and the latter not till after 12 o'clock. (3.) If the paper copied from has at some time annexed and published matter appearing in the other paper, thereby implying that it agrees to a free interchange of literary and other matter. (4.) If the editor of the paper copied from has taken no steps to inform the editor of the other paper that he objects to this use being made of his matter."

Cozens-Hardy, Q.C., *MacSwinney* (*Moulton*, Q.C., with them), for the Plaintiffs:—

The Plaintiffs have established that in a number of cases the Defendants have, in their newspaper of the 13th of April, extracted and republished matter from the Plaintiffs' paper in a manner that entitles the Plaintiffs, according to the principles on which the Court acts, to an injunction, provided the Plaintiffs have copyright. It is further established that it is the practice of the Defendants to take for their own benefit matter that has been procured by the Plaintiffs at great expense. For this reason it is the more desirable for the Plaintiffs to protect themselves by obtaining an injunction. The Plaintiffs have shewn that they have copyright in the *Rudyard Kipling* article, an article of permanent value, and three other articles separately, perhaps, of no great importance and of an ephemeral character; but, as the piracy of these articles is part of a system which is of serious injury to the Plaintiffs, it is important to have the decision of

the Court with respect to those articles. The Plaintiffs, therefore, ask for an injunction in respect of all four articles with costs.

The considerations on which the Court acts in granting or refusing an injunction are the nature and objects of the selections made by the copyist, the quantity and value of the material used, and the degree in which the use may affect the sale or supersede the objects of the original work, and whether the Defendants have applied in these selections what the Court can regard as real intellectual legitimate labour, or merely copied: *Cate* v. *Devon and Exeter Constitutional Newspaper Company* (1); *Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association* (2); *Sweet* v. *Benning* (3); *Maple & Co.* v. *Junior Army and Navy Stores* (4); *Scott* v. *Stanford* (5); *Campbell* v. *Scott* (6); *Cary* v. *Longman* (7); *Kelly* v. *Morris* (8); *Wilkins* v. *Aikin* (9).

The real defence set up by the Defendants is in fact a custom to steal, a practice against morals, that neither on principle nor authority can be adduced as a defence: *Wyatt* v. *Barnard* (10).

Rigby, Q.C., *Everitt*, Q.C., and *T. Howard Wright*, for the Defendants:—

The three small articles in which the Plaintiffs now claim to have established a copyright, numbered 5, 7, and 14, are of a trivial character and ephemeral, in the nature of news; a mere piece of news is not the subject of copyright.

The graveness of the Plaintiffs' case lies in the *Rudyard Kipling* article. The Defendants were willing to give an undertaking as to that article; not as matter of right. In respect of this article, as well as the other three, the general conduct and practice of newspapers acquiesced in by the Plaintiffs, and acted upon by them, is such as to render it inequitable that without previous notice or warning they should attempt to enforce a copyright. The evidence shews that there has sprung up a tacit

(1) 40 Ch. D. 500.
(2) Ibid. 425.
(3) 16 C. B. 459.
(4) 21 Ch. D. 369
(5) Law Rep. 3 Eq. 718.
(6) 11 Sim. 31.
(7) 1 East, 358.
(8) Law Rep. 1 Eq. 697.
(9) 17 Ves. 422.
(10) 3 V. & B. 77.

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convention between newspaper proprietors that they should take portions of letterpress from one another. The Plaintiffs have not only tacitly acquiesced in but have actually availed themselves of the custom.

If the Court should be of opinion that the Plaintiffs have established a legal right of action, their conduct has been in the action such that they ought not to be allowed costs. The Defendants had discontinued the publication of the important articles, and offered to undertake not to republish them.

June 2. NORTH, J. (after stating the facts, continued):—

With respect to the paragraphs in which the Plaintiffs have not proved that they have any copyright, they have not asked the interference of the Court. Of course, they could not have done so successfully. Such paragraphs can be reproduced by the Defendants with impunity. The Plaintiffs' claim for relief is confined to the article and paragraphs in which they have established that they are the owners of the copyright.

With regard to the *Rudyard Kipling* article, the Plaintiffs' case is clear—it is practically not disputed by the Defendants' advisers; though the grounds of justification put forward by the Defendants as to the other paragraphs would, if sound, apply to that article also. In that case the Defendants have deliberately reprinted the most attractive portions (to the extent of two-fifths of the whole) of an article which they admit they knew to have been acquired by the proprietors at a high cost and have laid it before their own readers as an interesting part of their own paper, not by way of illustration or as subject for comment or criticism, but in exactly the same manner as if they had themselves written or purchased it.

There are purposes, no doubt, for which, notwithstanding the Plaintiffs' copyright, the Defendants might legitimately have made reasonable extracts or copied passages from the article in question—as, for instance, if they had been criticising Mr. *Kipling's* works generally, and pointing their comments by taking specimens from various writings of his, or had been publishing a paper discussing the various modes in which he and other writers had dealt with the subject of the *Monadnock* article. In *Wilkins*

v. *Aikin* (1), Lord *Eldon* said: "There is no doubt, that a man cannot under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases very difficult to define, fair quotation"; and further on he says: "The question upon the whole is, whether this is a legitimate use of the plaintiffs' publication in the fair exercise of a mental operation deserving the character of an original work." In the present case what the Defendants have had recourse to is not a mental operation involving thought and labour and producing some original result, but a mechanical operation with scissors and paste, without the slightest pretension to an original result of any kind; it is a mere production of "copy" without trouble or cost.

To the shorter articles numbered 5, 7, and 14, and the other articles also included in the numbers from 1 to 22, the same remarks apply. It was said that of some of them it is ridiculous to make any complaint; and I concur to some extent in that observation. But however absurd it might be to complain of each of them taken singly, it is not immaterial to look at the number and character of the passages taken, in the whole; and also to bear in mind that it is not a mere casual trespass on the Plaintiffs' right, occurring now and again at long intervals, and not likely to be repeated; but a deliberate, persistent abstraction of matter from the Plaintiffs' paper, which the Defendants justify and insist on their right to continue. For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the Plaintiffs in procuring news for the purpose of saving labour and expense to themselves.

It is said that there is no copyright in news. But there is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day. The Defendants have copied from the *Times* without knowing, and probably without thinking, whether what they have taken was the subject of copyright or not. So far as the Plaintiffs are not proprietors of the copyright in the matters

(1) 17 Ves. 422, 424, 426.

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thus copied they have not any legal ground of complaint. But with respect to the passages numbered 5, 7, and 14, the Plaintiffs are within the protection of the law; and however small in importance those three particular passages may be in themselves, the line taken by the Defendants renders the question one of importance to the Plaintiffs, and they are entitled to ask for the decision of the Court.

With respect to the quantity of the matter copied, the passages pirated are taken in their entirety for the very purpose for which they were used by the *Times*—namely, to convey intelligence or information to the readers of the paper. It is not a case of the selection of a part, or quotation of an extract. The Defendants cannot justify what has been called the literary larceny of a book or chapter of an author by shewing that there are many other books or chapters by the same author from which they have not taken anything. In *Cary* v. *Longman* (1), an old itinerary by *Patterson* had been republished by the plaintiff with some corrections and additions of his own, and it was held that there the plaintiff was entitled to sue in respect of such corrections and additions, though there was not any copyright in the bulk of the work. In *Sweet* v. *Benning* (2), the head-notes only of certain law reports were taken. And in the *Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association* (3) it was held that the appropriation by one paper of a very small part of the contents of another ought to be restrained by injunction, and that was affirmed by the Court of Appeal. So, too, in the later case before me in the same volume (4).

The principal ground upon which the Defendants attempt to justify what has been done is the alleged existence of a well-recognised general custom—a universal mutual understanding of journalists—a tacit convention to which the *Times* was a party—that one paper may copy from another without asking permission, and that the consent of the proprietors of the paper copied from may be taken for granted if four conditions are observed.

(1) 1 East, 358.
(2) 16 C. B. 59.
(3) 40 Ch. D. 425.
(4) *Cate* v. *Devon and Exeter Constitutional Newspaper Company*, 40 Ch. D. 500.

The first of those conditions is that the source from which the quotation or information is taken should be duly acknowledged; and in connection with this I may say that several of the Defendants' witnesses state that it is an advantage to one newspaper to have extracts from it quoted by another, if the source from which they come is also stated. This may be so in some cases; but I doubt whether any jury would believe that it was an advantage to the *Times* to have its articles or paragraphs copied by the *St. James' Gazette*; and I do not myself believe it. But, however this may be if the alleged condition was observed, only seven out of twenty-two passages taken refer to the *Times* as the source of information, and not one of the paragraphs numbered 5, 7, or 14 does so. As to those, therefore, the very first of the four conditions upon which this justification is said to rest fails the Defendants.

Further than this, even a strict compliance with such conditions would not amount to a legal excuse at all. A man cannot justify the taking what he has no right to take by stating whence he has taken it, though he may thereby avoid the additional dishonesty of passing off as the product of his own labour what really is cribbed from another. In *Pike* v. *Nicholas* (1), the learned Judge, Vice-Chancellor *James*, says: "The Plaintiff has a right to say that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication." See also *Campbell* v. *Scott* (2), and *Scott* v. *Stanford* (3).

The second condition put forward as a thing to be regarded is that the paper copying and the paper copied must not be direct rivals or competitors, as, for instance, two evening newspapers in the same town; but when it is remembered that the second editions of the *Times* are published later than, and may be forestalled by the earlier edition of, the *St. James' Gazette*; and that the *Times* also publishes the evening *Mail* on three nights in the week, and also a weekly edition; and that the *St. James' Gazette*

(1) Law Rep. 5 Ch. 260, n. (2) 11 Sim. 31.
(3) Law Rep. 3 Eq. 718.

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also publishes the *St. James' Budget* weekly, it is obvious that there is not that absence of direct competition between them which the condition in question treats as essential. In this very case the purchase was made on the 12th of May of a copy of the *St. James' Budget* of the 14th of April, containing many paragraphs taken from the *Times* of the previous day, including that numbered 5.

The third condition alleged to be prescribed by the custom of journalism as allowing one paper to copy from another, is that the paper copied from has at some time itself taken matter from the other, thereby implying—it is suggested—that these two papers have agreed to an interchange of literary matter. And in support of this argument the Defendants have succeeded in hunting up two occasions in the course of twelve years in which the *Times* is said to have copied, without leave, parts of articles from the Defendants' paper. One of these occasions was in 1890, after the report of the *Parnell* Commission, when the *Times* quoted extracts from the leading articles of numerous *London* and provincial papers, shewing how very large and influential a portion of the press supported the views they had advocated, and in favour of which the Commission had reported. The essential feature of this was that the names of such papers should be put prominently forward; and I should have thought that the papers quoted would all have preferred to have their views stated in their own language rather than by way of paraphrase or summary, which the *Times* might unquestionably have done. The other case was the publication of a summary of the report of the German doctors relating to the illness of the Emperor *Frederick*, which occurred four years ago, and the exact explanation of which is not now forthcoming. The Defendants do not allege that they have any copyright in either of those articles, and, even if the facts had been exactly as they suggest, I do not see what legal ground they have for complaint. But, assuming that the *Times* had been entirely in the wrong on those two special occasions, it is idle to say that they afford any evidence whatever of an agreement that the *St. James' Gazette* might appropriate the contents of the *Times* for all time and to any extent; and it is especially idle to rely, as Mr. *Low* does

in his first affidavit, upon these two occasions in 1888 and 1890 as the foundation of a belief on his part that the Defendants might copy from the *Times* as they pleased, when he also admits that this systematic copying commenced when the *St. James' Gazette* was established in 1880, and has been continued on a large scale and uninterruptedly ever since.

The attempt to shew that the *Times* agreed to this journalistic practice of copying, from the fact of its having taken extracts from other papers than the *St. James' Gazette*, is a ludicrous failure; for the *Times* has shewn that in thirteen out of sixteen instances adduced by the Defendants the explanation is complete, most of them being cases in which the matter was inserted in the *Times* at the express request of the other papers, specially communicated to them in order that they might insert it; and the few others are trivial matters, doubtless susceptible of easy explanation at the time.

With respect, therefore, to three of these four conditions, the existence of which the Defendants say justifies them in believing they had a right to copy from the *Times*, their case breaks down altogether.

But even if all the alleged conditions had been complied with, what the Defendants have done with respect to articles or paragraphs in which the *Times* has copyright is wholly incapable of justification in point of law. The plea of the existence of such custom, or habit, or practice of copying as is set up can no more be supported when challenged than the highwayman's plea of the custom of *Hounslow Heath*. It has often been relied upon as a defence in such cases, but always has been repudiated by the Courts. In one of the early cases, *Wyatt* v. *Barnard* (1), the defendant relied on "the usual practice" among publishers of magazines to take articles from each other; but Lord *Eldon* pointed out that such a custom could not control the law. In the most recent case I recollect, *Maxwell* v. *Somerton* (2), where the general custom of provincial papers to make such extracts from other papers was relied on, Vice-Chancellor *Bacon* said that the injunction must go against the defendants, as they had done acts of which the plaintiff could legally complain. Lawful use

(1) 3 V. & B. 77. (2) 22 W. R. 313.

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for reviewing was right, but unauthorized copying of whole articles was illegal; and the custom of trade which had been alleged was no justification for breach of law. [His Lordship then dealt with an argument which had been founded on the form of the signatures to some of the articles taken from the *Times*; and proceeded:—]

The result is that the Defendants are entirely wrong. With regard to Mr. *Rudyard Kipling's* article, the interlocutory order must be continued. With regard to the other paragraphs I do not think any order necessary. Their interest has passed away, and they will not be repeated. It has not been shewn that any damages resulted to the *Times* from the illegal appropriation of these articles, and I do not think it necessary to observe the form of giving nominal damages.

With respect to the costs I have some observations to make. The Plaintiffs claim all the costs, upon the ground that a legal right has been infringed. In *Cooper* v. *Whittingham* (1), Sir *George Jessel* laid it down that when a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion, and cannot take away the plaintiff's right to costs. Mr. Justice *Chitty* seems to have taken much the same view in *Upmann* v. *Forester* (2). I never could understand that view. It seems to me going directly in the teeth of the General Orders and Act of Parliament, which say that the Judge has a discretion which he is to exercise, and is not bound by any hard-and-fast rule. And I am glad to see that in the recent case of the *American Tobacco Company* v. *Guest* (3), Mr. Justice *Stirling* has taken the same view. I do not, in the exercise of my discretion, intend to give any costs of that part of this action which does not relate to the *Rudyard Kipling* article. I do think that the Defendants were very summarily dealt with by being pulled up all at once without notice for doing what they had done precisely in the same way and on the same scale without any objection or complaint for twelve years past. I am not referring to the *Monadnock* article at all. With respect to that the Plaintiffs were entirely right,

(1) 15 Ch. D. 501. (2) 24 Ch. D. 231. (3) [1892] 1 Ch. 630.

a flagrant act of piracy had been committed, and the remedy, to be of any use, had to be applied promptly; but, as to the other three matters, they seem to me trivial in themselves; no one suggests that any damage arose from them; they were not included in the original action, but were only introduced into it at a later stage; and I do not believe that these matters would have been the subject of complaint at all had it not been that the existence of an unquestionably good ground of action seemed to furnish the Plaintiffs with an opportunity for trying to throw their net more widely. They have obtained my view as to the law. But when we come to speak of costs, having regard to what has been so notorious a practice for so many years, I think that the Defendants should have had notice given or protest made to them before proceedings on these grounds were commenced against them.

I desire not to be misunderstood. It never has been the law, nor am I laying down any rule, that a defendant should always have notice of the intention to bring an action before it is brought. In many cases there is no time for such notice, as promptitude is essential; for instance, in this very case, as to the *Rudyard Kipling* article. In many cases the knowledge that an action was about to be brought would enable the defendant to take such steps as would render such action useless. Notice by a patentee that he was about to bring an action against an infringer would probably, according to recent decisions, have the effect of precipitating an action against himself for the use of a threat. But, exercising my discretion, I am of opinion that, under the circumstances of this case, adequate justice will be done by my requiring the Defendants to pay the Plaintiffs all the costs of this action down to and including the 26th of April, and also such further costs as would have been properly incurred by the Plaintiffs in proceeding upon a motion, unopposed by the Defendants, to make the interlocutory order perpetual: and leaving all other costs of the action to be borne by the parties who incurred them.

1892. July 29. The action was brought on this day on notice to vary the minutes on the part of the Plaintiffs.

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NORTH, J. (the Defendants not opposing), directed that a declaration of the Plaintiffs' title to the three articles numbered 5, 7, and 14, respectively should be added to the judgment; but the judgment was to bear date June 2nd, 1892.

Solicitors for Plaintiffs: *Soames, Edwards, & Jones*,
Solicitors for Defendants: *Freshfields & Williams.*

D. P.

NORTH, J.
1892
Aug. 10.

EVANS *v.* WARE.

[1892 E. 818.]

Infant—Contract for Service.

An infant, in consideration of being employed as a milk carrier, agreed not to compete in business within a radius of five miles for two years after leaving. He left shortly after attaining majority.

An injunction was granted to restrain breach of the agreement by the servant.

THE Plaintiffs in this action were two persons suing as carrying on business as "*The Cardiff Milk Supply Company.*" The Defendant was *Charles Ware*, who had formerly been in their employ as milk carrier.

The writ asked an injunction to restrain the Defendant from carrying on or serving in the business of milk vendor within five miles of the Plaintiffs' place of business.

The action was brought on on motion for an interlocutory injunction.

The Defendant went into the Plaintiffs' employ before July, 1890. He was at first employed as a stableman. Shortly before the 4th of July, 1890, his employment was changed to that of milk carrier, and his wages were raised. On that day he signed the agreement in question, which is in the following terms:—

"In consideration of your taking me into your employment at the wages of 21*s.* per week to commence with, as one of the sellers of milk and collectors of money on your behalf, I hereby undertake not to leave your employment without giving to you 7 days' notice, in writing, of such my intention, and I also undertake after leaving your service, whether through your giving me

notice to leave, or my giving you notice to leave, not to commence business on my own account or in partnership with any other person or persons as a vendor of milk at *Cardiff*, or within a radius of 5 miles of your place of business, nor enter into the service of any other seller of milk in the same town or within the radius aforesaid for 24 months after the expiration of the aforesaid notice."

The Defendant was under age when he signed the agreement. He attained the age of twenty-one on the 22nd of June, 1892. He left the Plaintiffs' employ on the 8th of July, 1892. When the writ was issued, he was engaged in the sale of milk in *Cardiff*, within the area prohibited by the agreement.

There was evidence on the part of the Plaintiffs that the Defendant, when he was first employed to sell milk, asserted that he was twenty-one years old, and that the agreement was read and explained to him when he signed it.

The Defendant made affidavits, setting up that he was under age when he signed the agreement; that he was at that time an ignorant rustic; that the agreement was only partly read over to him, and was not explained to him; and setting up want of sufficient consideration. He denied that he had represented himself as being of full age.

Vernon R. Smith, for the Plaintiffs:—

The plea of infancy is set up by the Defendant; that is answered by the fact that the contract was a beneficial contract for service. Moreover, the Defendant concealed the fact of his infancy.

Bramwell Davis, for the Defendant:—

It was not for the benefit of the infant that he should enter into a stipulation not to compete after he left. The terms of the agreement were harsh and unreasonable, especially in the provision that he should be liable to be dismissed at a week's notice. Such a contract is not now considered binding on an infant, whatever it might have been on the older authorities: *De Francesco* v. *Barnum* (1).

(1) 43 Ch. D. 165; 45 Ch. D. 430.

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[NORTH, J.:—There are many cases which shew that a contract like this is binding on an infant: for instance, *Cornwall* v. *Hawkins* (1); *Fellows* v. *Wood* (2).]

In *Cornwall* v. *Hawkins* the infant had ratified the contract after he came of age. The case of *Fellows* v. *Wood* was disapproved by Mr. Justice *Chitty*, in *De Francesco* v. *Barnum* (3).

NORTH, J.:—

The Defendant, who was under age, about June, 1890, applied to the Plaintiffs for occupation; and he got it. He was at first employed in connection with horses; after a time his occupation was changed, and he became a carrier of milk at an increase of wages. Some short time afterwards, probably at the end of the first week when he was paid, his employer asked him to sign a contract that when he left he would not enter into a competitive business for two years. It is said that such a contract is not for the benefit of an infant who signs it. That argument is founded on a confusion of terms. It may be that such a contract is not so much for the benefit of the infant as a contract for employment would be without any restriction on his part; but that does not prevent a contract by which he gets employment, coupled with a bargain on his part that he will not compete after his service ceases, from being beneficial to the infant. I am of opinion that such a contract is very beneficial. The reason is that, if he is able to make such a bargain, he obtains the means of earning or continuing to earn his livelihood; he gets the employment which he would not otherwise obtain, or continue to have without being subject to the restriction. It is said, and it is a very fair point to put in argument, that the consideration in this case was not equivalent to the burden the Defendant took upon himself; because the service was terminable at a week's notice on either side. It is a short time; but persons engaged in the trade know their own business best. We have had in this Court lately a number of cases relating to the employment of a milk carrier, and I therefore know from experience that a week is a usual time for notice to leave in that business.

(1) 41 L. J. (Ch.) 435. (2) 59 L. T. (N.S.) 513.
(3) 43 Ch. D. 174.

In the case of *Cornwall* v. *Hawkins* (1), the period for notice was one week; in *Fellows* v. *Wood* (2), two. I do not, therefore, see anything unreasonable in limiting a week as the time for giving notice. Then it is said that an infant cannot bind himself by a contract in this way. The cases shew clearly that he can.

In *Cornwall* v. *Hawkins*, an infant entered into the service of a milk seller, and covenanted not to carry on the same trade, and after he came of age he continued in the same service for eighteen months without repudiating the contract. It was held that his conduct amounted to a ratification of the contract in equity, and an injunction to restrain a breach of the covenant was granted. In that case no doubt a main consideration weighing with the Court was that the employment was continued a considerable time after the servant came of age, and that circumstance does not exist in the present case. It is clear that, although that circumstance relieved the Court from a difficulty, Vice-Chancellor *Wickens* did not think it essential to the validity of the agreement. The case of *Fellows* v. *Wood* was very like the present case. I have looked at the statement of facts and the judgments of Mr. Justice *Manisty* and Mr. Justice *Stephen*; they lay down the law clearly in terms applicable to the present case, that the question was whether the contract was beneficial for the infant; and that I follow, holding as matter of fact that this contract was for the benefit of the infant.

Then it is said that doubts have been thrown on that case by Mr. Justice *Chitty* in *De Francesco* v. *Barnum* (3). That I entirely dissent from. *Fellows* v. *Wood* was there cited as an argument against the decision that Mr. Justice *Chitty* gave. He pointed out the difference between a contract of ordinary service and a contract of apprenticeship. He does add that the defendant continued to serve after the contract was terminated. I think the learned Judge had not in his mind the exact facts of that case, but was thinking of the facts in the other case, *Cornwall* v. *Hawkins*.

I do not wish to introduce further matter into this case. But there is some evidence that the Defendant represented himself

(1) 41 L. J. (Ch.) 435. (2) 59 L. T. (N.S.) 513.
(3) 43 Ch. D. 165, 174.

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as being of full age when he was asked the question by his employer; and, reading the evidence of the Defendant, I cannot say I think he was the unsophisticated rustic he tries to make himself out to be.

Solicitor for Plaintiffs: *Lewis W. H. Jones*, agent for *J. Morgan, Cardiff.*

Solicitors for Defendant: *Riddell, Vaizey & Co.*, agents for *J. H. Jones, Cardiff.*

D. P.

NORTH, J.
1892
Aug. 11.

EVERITT *v.* AUTOMATIC WEIGHING MACHINE COMPANY.

[1892 E. 956.]

Mortgagor and Mortgagee—Payment of Mortgage Debt—Right of Mortgagor to require Transfer of Security to his Nominee in lieu of Reconveyance—Company—Lien on Shares for Debt due from Shareholder—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2, 15.

The articles of association of a company provided that the company should have a first and paramount lien upon the shares of each member for his debts to the company, and that, for the purpose of enforcing the lien, the directors might, on default in payment of a debt, sell the shares, and execute a transfer of the shares sold to the purchaser:—

Held, that this lien constituted a "charge" upon the shares, within the meaning of sect. 2, sub-sect. vi., of the *Conveyancing and Law of Property Act*, 1881, for a debt due from the shareholder to the company, and that, consequently, sect. 15 applied, and entitled the shareholder to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee.

The shareholder undertaking, on four days' notice by the company, to pay to them the sum due from him, upon their transferring their lien to his nominee, an injunction was granted restraining the company, until the trial of the action or further order, from selling or transferring the shares.

MOTION by the Plaintiff for an injunction to restrain the Defendant company, and their directors and agents, from selling or transferring the shares in the capital of the company held by and registered in the name of the Plaintiff, or any of them, pursuant to the powers for those purposes conferred by the articles of association of the company.

The Plaintiff was the owner and registered holder of 3909

shares in the company. The shares were of the nominal value of £1 each, and they were credited as fully paid up. The articles of association contained the following clauses:—

"(38.) The company shall have a first and paramount lien upon the shares of each member for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period of the payment, fulfilment, or discharge thereof shall have actually arrived or not.

"(39.) For the purpose of enforcing such lien, the directors may sell the shares subject thereto without any notice to or consent by the holder of such shares, or any other person, but no such sale shall be made unless and until default be made in the payment, fulfilment, or discharge of such debts, liabilities, or engagements, or some of them.

"(40.) A certificate in writing, under the hands of two of the directors, and countersigned by the secretary, that the last-mentioned power of sale has arisen, and is exercisable by the company under these presents, shall be conclusive evidence thereof.

"(41.) Upon any such sale the directors, or any one of them, may execute a transfer of the shares sold to the purchaser thereof, and such transfer, with the certificate last aforesaid, shall confer on the purchaser a complete title to such shares."

The Plaintiff was indebted to the company in the sum of £4671 6*s.* 6*d.* The directors were pressing him for payment, and threatening that, if the debt were not paid, they would put in force the power of selling his shares conferred by the above clauses in the articles. The Plaintiff entered into an agreement with a Mr. *Hore* for the sale of the shares to him for £4971 6*s.* 6*d.* *Hore* was willing to pay to the company the amount due to them by the Plaintiff, and the Plaintiff requested the company, on this payment being made, to assign their debt and their lien under the articles on the shares to *Hore* as the Plaintiff's nominee. The Plaintiff considered that he was entitled, by virtue of sect. 15, sub-sect. 1, of the *Conveyancing Act*, 1881, to require the company to make this assignment.

The company declined to make the assignment, and the Plaintiff then commenced this action.

By the writ he claimed (1.) an account of what was due from

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him to the company for principal and interest on the security of the lien claimed by them under their articles on the shares; (2.) redemption of the shares; (3.) a declaration that, on payment to the company of the amount due to them by the Plaintiff, they were bound to assign the debt and their lien upon and interest in the shares to such person as the Plaintiff should direct; (4.) an injunction to restrain the company from selling or transferring the shares, or any of them, pursuant to the powers for those purposes conferred by the articles.

The Plaintiff now moved for an injunction in the terms of his notice of motion.

Cozens-Hardy, Q.C., and *A. Whitaker*, for the Plaintiff:—

Sect. 15, sub-sect. 1 (1), of the *Conveyancing Act*, 1881, applies to this lien of the company, and entitles the Plaintiff, as mortgagor, to require the company, as mortgagees, to assign the mortgage debt and transfer their lien on the shares to his nominee, on payment by the Plaintiff of the amount due by him to the

(1) "Sect. 2 (i.): Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest.

"(v.): Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance.

"(vi.): Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property."

"Sect. 15 (1): Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

"(2): This section does not apply in the case of a mortgagee being or having been in possession.

"(3): This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

company. This he is ready to pay. The company's "lien" is a "charge" on the shares within the definition in sect. 2, sub-sect. vi., of the Act. The lien constitutes an equitable charge upon the shares: *In re General Exchange Bank* (1). The Plaintiff is entitled to the injunction which he claims.

S. Hall, Q.C., and *Swinfen Eady*, for the Defendants:—

This lien is not a "charge" within the meaning of the Act; it only gives a right to hold the shares until the debt is paid. The company have received notices from third parties, who claim an interest in the shares. If the lien does constitute a "charge" on the shares, the Plaintiff may be entitled to require a transfer of the shares to his nominee in lieu of redemption; but that is not what he is now asking. He is not entitled to the injunction.

Cozens-Hardy, in reply.

NORTH, J.:—

The lien on the shares, which is created by the articles of association, is not like a solicitor's lien upon documents of his client which are in his hands, a lien which is lost when the solicitor parts with the documents. The company's lien, as was pointed out by Lord Justice *Mellish* in *In re General Exchange Bank* (2), constitutes an equitable charge upon the shares for the debts due from the shareholder to the company. Consequently, by virtue of sect. 2, sub-sect. vi., of the *Conveyancing Act*, the lien is a "mortgage," and the Plaintiff is a "mortgagor" within sect. 15, sub-sect. 1, of the Act, and is entitled to require the company to transfer their lien on the shares to his nominee on payment of the debt. The Plaintiff is, I am told, ready to pay the debt, and I must restrain the company from selling or transferring the shares during such a time as will enable the Plaintiff to pay the debt.

MINUTE OF ORDER.—Plaintiff undertaking, on four days' notice by Defendants, to pay the amount owing from him to them, on their transferring their lien or charge to his nominee, grant the injunction asked for until trial or further order.

Solicitors: *Stephens & Stephens; Adam Burn & Son.*

(1) Law Rep. 6 Ch. 818. (2) Law Rep. 6 Ch. 821.

W. L. C.

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May 19, 26, 28; *July* 5.

In re PARKIN.

HILL *v.* SCHWARZ.

[1892 P. 591.]

Testamentary Power—Contract to Exercise—Specific Performance—Damages—Marriage Settlement—Covenant by Husband and Wife that Wife's Power should, if executed, be executed in Favour of Trustees—Breach of Covenant—Liability of Wife's Executors—Appointed Fund Assets for Payment of Wife's Ante-nuptial Debts.

The Court will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment.

By a marriage settlement, executed in 1867, the husband and wife severally covenanted that all property whatsoever which the wife or the husband in her right should at any time during the coverture become possessed of or entitled to in any manner whatsoever should be settled, and that any power of appointment of which she might then or at any time thereafter during such coverture be the donee, should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment over a sum of stock which, by her will, she exercised in favour of persons other than the trustees:—

Held, that the covenant could not be specifically enforced, but that the trustees were entitled to recover by way of damages from the wife's executors to the extent of her assets the value of the property which would have come to the hands of the trustees if the appointment actually made had been in their favour; and that the appointed fund was assets for the payment of her debts.

Whether the husband was liable under his personal covenant, *quære*.

ADJOURNED SUMMONS.

Hugh Parkin, by his will dated the 13th of December, 1860, bequeathed all the 2½ per cent. stock which at the time of his death he should hold or be possessed of to trustees upon trust for his daughter *Mary Creighton* (afterwards Mrs. *Tetens*), during her life without power of anticipation, and after her death, as to the sum of £5000 part thereof, upon trust for such persons or purposes as Mrs. *Tetens* should, notwithstanding her then present or any future coverture, by will appoint, and in default of, and subject to, any such appointment, upon trust for the benefit of

two others of his daughters and their issue as therein mentioned.

The testator died on the 16th of March, 1871, possessed of £7000 2½ per cent. stock.

By an indenture dated the 20th of December, 1867, being the settlement made on the marriage of *Mary Creighton* with the Defendant, *Emil Tetens*, after a recital that by an indenture of settlement made in 1848 Mrs. *Tetens* then stood possessed of certain powers of appointment over divers sums of money, stocks, funds, and securities, and the annual produce thereof respectively, subject to a life interest therein of her father, *Hugh Parkin*, it was witnessed that Mrs. *Tetens*, by virtue and in execution of the power for that purpose given by the recited indenture of settlement and of all other powers and authorities enabling her in that behalf, appointed certain funds to the trustees of the settlement of 1867, upon trusts (after the intended marriage) for Mrs. *Tetens* during her life, for her separate use without power of anticipation, and after her death out of the income to pay an annuity of £100 to *Jules Creighton*, her son by her first marriage, and subject thereto to pay the income to Mr. *Tetens* during his life, determinable as therein mentioned, and subject thereto upon trust for the child or children of Mrs. *Tetens* (including her said son by her first marriage) who should be living at the death of the survivor of Mr. and Mrs. *Tetens*, and for the issue then living of any and every of Mrs. *Tetens'* then deceased child or children (including her said son by her first marriage) who, being males, should attain twenty-one, or, being females, should attain that age or marry, to take, if more than one, in equal shares as tenants in common *per stirpes*; and in the case of the decease of Mrs. *Tetens* without leaving any such child or issue, who should live to attain a vested interest in the premises, then upon trusts for a sister of Mrs. *Tetens* and her issue.

The settlement contained the following covenants, upon which the question in this case arose:—

The said *Emil Tetens* and *Mary Creighton* severally covenanted that all the estate, property, and effects whatsoever which the said *Mary Creighton*, or the said *E. Tetens* in her right, should at any time during the coverture become possessed of or entitled

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to at law or in equity in any manner whatsoever should be settled; and also that any other powers or power of appointment over any estate, property, and effects whatsoever of which she might then or at any time thereafter during such coverture be the donee under any settlement, will, or other instrument whatsoever, should, if executed by her, be executed only in favour of the trustees or trustee for the time being of the settlement, in order that all such estate, property, and effects should be effectually vested in and be held by them or him upon the trusts declared by the settlement.

There was no issue of the marriage between Mr. and Mrs. *Tetens.*

Mrs. *Tetens*, by her will dated the 29th of March, 1889, appointed her husband and Mr. *Frank Milner Russell* her executors, and, after bequeathing £100 to Mr. *Russell* and reciting the power conferred on her by the will of her father of appointing by will £5000 2½ per cent. stock, she directed and appointed that from and after her death the trustees of her father's will should stand possessed of the said sum of £5000 upon the trusts following, viz., as to the clear sum of £1000, part thereof in trust for her nephew *Hugh Campbell Rowley*, to whom she bequeathed the same accordingly free of legacy duty; and as to the residue thereof (subject to the payment thereout of her just debts, funeral and testamentary expenses, and the legacy bequeathed to *H. C. Rowley* and the legacy duty thereon) in trust for her husband absolutely.

She made a codicil dated the 5th of December, 1889, by which she revoked the appointment and bequest in her said will contained of £1000 to *Hugh Campbell Rowley*, and directed and appointed that from and after her death the trustees of her father's will should out of the sum of £5000 2½ per cent. stock referred to in her will, raise and pay certain legacies amounting to £700 and, subject to the aforesaid legacies, should stand possessed of the residue of the said stock upon the trusts by her said will declared with reference to the residue of the same after payment to the said *H. C. Rowley* of the legacy thereby revoked.

Mrs. *Tetens* died on the 19th of January, 1892, leaving Mr. *Tetens* and her son by her first marriage her surviving. Her

will and codicil were proved on the 8th of March, 1892, by both executors.

Questions having arisen as to the effect of the covenants on the part of Mr. and Mrs. *Tetens* contained in the settlement of the 20th of September, 1867, and the testamentary dispositions made by Mrs. *Tetens*, an originating summons was taken out by the trustees of *Hugh Parkin's* will for the purpose of obtaining the decision of the Court upon them. This summons was intituled in the matter of the estate of *Hugh Parkin*, in the matter of the trusts of the settlement of the 20th of December, 1867, and in the matter of the trusts of the will of Mrs. *Tetens*. The questions for the determination of the Court were (*inter alia*)—(1.) Whether the £5000 2½ per cent. stock ought to be paid to the trustees of the settlement or to the executors of Mrs. *Tetens'* will; (2.) Whether under the terms of the settlement Mrs. *Tetens* was under any and what liability to exercise the power of appointment conferred upon her by the will of the testator in favour of the trustees of the settlement; (3.) Whether by reason of the exercise of the power by Mrs. *Tetens*, as in her will and codicil mentioned, her estate had become liable to the trustees of the settlement, and to what extent; (4.) What interest the Defendant *Emil Tetens* was entitled to under the appointment contained in the will and codicil of Mrs. *Tetens*; (5.) Whether the Defendant *Emil Tetens* was liable in respect of such interest or otherwise to the trustees of the settlement to any and what extent.

The summons came on for hearing on the 19th of May, 1892.

Sheldon, for the trustees of *H. Parkin's* will.

Buckley, Q.C., and *Maidlow*, for *Jules Creighton*.

Muir Mackenzie, for the trustees of the settlement.

Henry Fellows (*Hastings*, Q.C., with him), for the executors of Mrs. *Tetens'* will, contended that the power, being exerciseable by will only, did not come within the scope of the covenants as to after-acquired property contained in the settlement, and relied upon in *In re Mainwaring's Settlement* (1).

(1) Law Rep. 2 Eq. 487.

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STIRLING, J., decided against that contention, and directed the summons to stand over in order that the Defendant *Emil Tetens* might be separately represented.

May 26. *Sheldon*, for the trustees of *H. Parkin's* will.

Buckley, Q.C., and *Maidlow*, for *Jules Creighton*:—

We are entitled to specific performance of Mrs. *Tetens'* covenant not to exercise the power of appointment except in favour of the trustees of the settlement. The property subject to the power is bound by the covenant. Where a person has contracted to devise land in a particular way, and fails to perform the contract, the land itself is bound by the covenant: *Fry* on Specific Performance (1); *Goylmer* v. *Paddiston* (2); S.C. as *Goilmere* v. *Battison* (3); *Fortescue* v. *Hennah* (4); and *Loffus* v. *Maw* (5), which is not entirely overruled by *Maddison* v. *Alderson* (6). The covenant, being contained in a marriage settlement, is for valuable consideration, and ought to be specifically performed. It creates a lien on the property: *Vaizey* on Settlements (7); *Lee* v. *Lee* (8). We are not asking the Court to treat a deed which is not in testamentary form as a will; we are seeking to enforce a covenant in a deed.

[STIRLING, J., referred to *Davies* v. *Huguenin* (9).]

After the date of the settlement, the property forming the subject of the covenant ceased to be part of Mrs. *Tetens'* estate, to the extent that she could only dispose of it in a particular way. It was no longer her own property, and therefore the covenant was no interference with the *Wills Act*. A covenant to devise, where the covenantor has only a power of appointment, is much the same in effect as if the property belonged to him; the difference being that, if he owns the property, the covenant is binding upon the heir and the devisee; whereas, if he has only a power of appointment over the property, the covenant does not affect those who take in default of appointment. If the

(1) 2nd Ed. p. 96; 3rd Ed. p. 107.
(2) 2 Vent. 353.
(3) 1 Vern. 48.
(4) 19 Ves. 67.
(5) 3 Giff. 592, 604.
(6) 8 App. Cas. 467.
(7) Page 201.
(8) 4 Ch. D. 175.
(9) 1 H. & M. 730.

covenant cannot be specifically enforced by an order to transfer the fund to the trustees of the settlement, we are, at any rate, entitled to damages. The husband cannot take as against his own covenant, and he is trustee of the beneficial interest appointed to him.

[They also referred to *Vaizey* on Settlements (1).]

Hastings, Q.C., and *Henry Fellows*, for the executors of Mrs. *Tetens'* will:—

It is said that, if we take the fund, we must take it subject to the covenant; but the covenant operates by way of personal contract, and we submit that Mrs. *Tetens* had no power to enter into any such contract as this. The only power given to her by the donor was to indicate by will the persons who were to take. She had no power to effect it by means of a covenant in a deed. It is admitted that it was only by will that she could oust the persons who would take in default of appointment; and if there could be any contract by her, it would be one which could only take effect when she was dead. She never could herself have any estate in the property. The cases relied upon refer to contracts as to specific estates, not to powers which might never arise.

Beale, Q.C., and *Ingle Joyce*, for the Defendant, *Emil Tetens*:—

The possessor of a power of appointment over any property has a right to say that he will put another in the same position as if he had made a will in his favour. The authorities do not go beyond that. There is nothing to support the proposition that the only difference between the case of a covenant by an owner of property and one by the owner of a power of appointment, is the effect upon those who take in default of appointment. This covenant was never intended to, and could not, operate upon such a power as this; its object was to prevent the wife from defeating her covenant to settle after-acquired property. No contract which the lady could make could bind her to exercise the power in any particular way, or could bind the property or her with reference to it: *In re Currey* (2); *Reid* v.

(1) Page 1499. (2) 32 Ch. D. 361.

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Shergold (1). So far as the lady is concerned, the fund is certainly not bound; but it is said that the husband is bound in some way, and the settlement must be carefully considered. On the question of construction, it must be borne in mind that each party covenants only as to what he or she can perform: *Robinson* v. *Walker* (2); *Macqueen* on Husband and Wife (3); *Dawes* v. *Tredwell* (4); *Ramsden* v. *Smith* (5).

[STIRLING, J.:—The husband may be liable in damages.]

There is no liability upon the husband at all. He has done nothing inequitable, and nothing which he has contracted not to do. But even supposing he is bound by the covenant, there can be no damages in respect of the breach, for no harm has been done to the persons with whom the covenant is made. There is no covenant that the wife shall appoint the fund in favour of the trustees, but only that the power shall not be exercised except in their favour. The husband's covenant must be confined strictly to what he himself can perform. The trustees cannot have any claim upon the portion of the fund which ultimately comes to him by virtue of the appointment.

Muir Mackenzie, for the trustees of the settlement.

Buckley, in reply:—

It is said that inasmuch as *Hugh Parkin's* will simply gave Mrs. *Tetens* a power to dispose of the fund by will, her right was limited to that, and she could not appoint by deed. But there is no distinction for this purpose between an absolute owner and a donee of a power of this sort. *Fortescue* v. *Hennah* (6) shews that a person may bind himself to dispose of property by will in a particular way. It was held there that the property was bound by the covenant.

We submit, first, that the whole fund is bound by the covenant; secondly, that the husband is trustee of anything which comes to him for the trustees of the settlement; thirdly, if we cannot have specific performance, we are entitled to damages.

(1) 10 Ves. 370.
(2) 1 Salk. 393.
(3) 3rd Ed. p. 248.
(4) 18 Ch. D. 354.
(5) 2 Drew. 298.
(6) 19 Ves. 67.

July 5. STIRLING, J. (stated the facts, and continued):—

It was contended, on behalf of *Jules Creighton*, that inasmuch as Mrs. *Tetens* had made a will executing the power contained in the will of her father, the property which she had power so to dispose of was, as against volunteers claiming under her, bound by the covenant contained in her settlement. It was not disputed that if Mrs. *Tetens* had not made a will, the £5000 stock must have gone to the persons entitled under *Hugh Parkin's* will in default of appointment by her; but it was said that the persons claiming under her will, being mere volunteers, could not set up a title to the appointed property against persons claiming it for valuable consideration; and in support of this contention the following cases, amongst others, were cited: *Goylmer* v. *Paddiston* (1); S.C. *sub-nom. Goilmere* v. *Battison* (2); and *Fortescue* v. *Hennah* (3).

Unquestionably these cases shew that the Court has gone a long way in enforcing, by way of specific performance, contracts to leave property by will; but not one of them is a case of a contract to leave by will on the part of one who was merely donee of a testamentary power of appointment. In my judgment, specific performance ought not to be decreed in such a case.

"It is not, I apprehend, to be doubted," says *Rolt*, L.J., in *Cooper* v. *Martin* (4), "that equity . . . . will never uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention." In *Reid* v. *Shergold* (5), Lord *Eldon*, speaking of a claim by a purchaser from the donee of a testamentary power to the assistance of the Court, says: "The testator did not mean, that she should so execute her power. He intended, that she should give by will, or not at all; and it is impossible to hold, that the execution of an instrument, or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered

(1) 2 Vent. 353.
(2) 1 Vern. 48.
(3) 19 Ves. 67.
(4) Law Rep. 3 Ch. 47, 58.
(5) 10 Ves. 370, 380.

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in equity an attempt in or towards the execution of the power."

These remarks were made in a case in which the contest was between the purchaser and a person claiming in default of appointment. I think that in principle they apply where the question arises between persons claiming under a contract for value on the one hand, and those claiming under the will on the other. I think, therefore, that this contention fails.

I have next to consider what are the legal rights of the trustees of the settlement in respect of the covenants. Can they recover for breach of the covenant on the part of the wife contained in the settlement, and if so what amount of damages, and against whom? First, has Mrs. *Tetens* broken her covenant? She covenanted that "any other power or powers of appointment over any estate, property, or effects whatsoever, over which the said *Mary Creighton* may now, or at any time hereafter, during such coverture as aforesaid, be the donee under any settlement, will, or other instrument whatsoever, shall, if executed by her, be executed only in favour of" the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment, which she might have exercised in favour of the trustees. The power was executed by her, but not in favour of the trustees. It seems to me that this constituted a breach of the covenant. Next, what is the amount of damages to be recovered in respect of such breach? It is said that the damages ought to be nominal only because the trustees are in no worse position than if the wife had declined to exercise the power (which, no doubt, she was at liberty to do), with the result that the fund had gone as in default of appointment. It seems to me, however, that as the wife might have exercised the power in favour of the trustees, and she did exercise it, but not in their favour, the covenantees ought to be placed, as nearly as may be, in the same position as if the covenant had been duly performed; and, consequently, that the trustees are entitled to recover by way of damages the value of the stock which would have come to their hands if the appointment actually made had been in their favour.

Then comes the question, Who is liable in respect of the breach?

The marriage took place in 1867, before the passing of any of the recent *Married Women's Property Acts*, and the liability in respect of Mrs. *Tetens'* ante-nuptial contracts is consequently governed by the common law.

Now, the liability in respect of the wife's ante-nuptial debts has recently been considered by the Court of Appeal in the case of *Beck* v. *Pierce* (1), and I cannot do better than read the statement of the law which is given by Lord Justice *Lindley* in delivering the judgment of the Court. He says: "At common law a husband was liable to such debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or none. But he could not be sued alone for such debts, if his wife was alive: and he could not be sued at all for them after his wife's death: *Co. Litt.* (2).; *Com.* Dig., Baron and Feme (3). Nor was a promise by him to pay such debts of any avail, if the only consideration for the promise was his pre-existing liability to pay them: *Mitchinson* v. *Hewson* (4), where such a promise was averred. Nor would a Court of Equity assist his wife's creditors against him, even if he had acquired property through her: *Heard* v. *Stanford* (5). If he and she were both sued, and judgment was recovered against both, such judgment could be enforced against the survivor. If judgment was recovered against her before her marriage, a *sci. fa.* lay against him and her after marriage, and, if judgment was obtained against them both on such *sci. fa.*, and then she died, such judgment bound him: *Obrian* v. *Ram* (6). But a judgment against her alone did not affect him after her death, except of course in his character of administrator."

To the authorities cited by the Lord Justice, I desire to add the case of *Lockwood* v. *Salter* (7), which relates to a covenant by a wife contained in her own marriage settlement, the action being brought against the husband. The Lord Justice, in the concluding words of the passage which I have just read, refers

(1) 23 Q. B. D. 316, 320.
(2) 351 b.
(3) Y. & 2 C.
(4) 7 T. R. 348.
(5) 2 Eq. C. Ab. 134, pl. 5.
(6) 3 Mod. 186.
(7) 5 B. & Ad. 303.

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to the liability of the husband when he becomes administrator of his wife, and the law upon that appears to me to have been long well settled.

In *Wentworth* on the Office of Executors, the 1st edition of which was published in 1641 and the 14th in 1829, at pp. 369, 370 of the last edition, the law is laid down thus. After referring to the property to which the husband becomes entitled *jure mariti* and explaining the law as stated by Lord Justice *Lindley*, that the husband, after his wife's death, is not liable by reason of property so acquired to pay her ante-nuptial debts, the author goes on to say this:—"Another sort or kind of goods, or rather interests, a woman may have, viz., debts or things in action, which as the former, are not devested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real; for that though the husband do over-live the wife, he shall not be entitled to them as to the former. But if his wife make him executor, as she may, or if after her death he take administration of her goods; then, as he is thereby entitled to them, so is he liable also to pay her debts out of the same, when he shall have received them."

That statement of the law is recognised by Lord Chancellor *Parker* in *Earl of Thomond* v. *Earl of Suffolk* (1), and by Lord Chancellor *Talbot* in *Heard* v. *Stanford* (2); and in the successive editions of *Williams* on Executors.

In the present case the husband has not taken out administration; but, in accordance with the present practice of the Probate Division, probate has been granted to him and Mr. *Russell*, who are the legal personal representatives of the wife. The authorities to which I have just referred appear to me to shew that they are liable on the wife's covenant to the extent of the assets come to their hands.

What then are the assets which are available for payment of the debt? That is a point which was not really discussed before me, and if any question arises on it, it ought to be further discussed; but I shall take leave to state the conclusions which

(1) 1 P. Wms. 461. (2) 3 P. Wms. 409; Cas. t. Tal. 173.

occur to me at the present moment. In the first place the testatrix appears to me to have herself made the fund in question subject to the payment of her debts, and this is a legal debt. A question might arise as to whether the legacies to the amount of £700 would not, upon the pure construction of the lady's will, take precedence; but I apprehend that the fund, being subject to a general power of appointment which the testatrix has exercised, would be assets for payment of the wife's ante-nuptial debts: see *Fleming* v. *Buchanan* (1). In saying that I do not forget the decision of Lord Justice *Kay* in *In re Roper* (2), where he held that the appointment of a fund by a married woman did not make the appointed property liable as assets of the appointor in respect of debts contracted after the marriage in respect of her separate estate. But the Lord Justice recognises the general law at p. 487 of the report, where he says: "There is no doubt that, in case of a man who has a general power of appointment and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts." The conclusion at which he arrives is thus expressed (3): "In this case the powers of appointment were only by will; and as the provision of sect. 1, sub-sect. 4, of the *Married Women's Property Act*, 1882, does not apply, in my opinion the property appointed by her will is not subject to her engagements made during her coverture." Totally different considerations apply to a case when the liability arises out of an ante-nuptial contract. As at present advised, therefore, it seems to me that the appointed fund is assets for payment of the debts, and that really settles all questions which arise in the case. Under these circumstances I abstain from expressing any opinion on the question which was argued as to the effect of the husband's personal covenant. That appears to me to give rise to considerations of very considerable nicety which perhaps were not fully discussed, and on which it seems unnecessary at present to express any opinion.

Solicitors: *Evans, Foster, & Wadham; A. A. Collyer-Bristow; Prince & Ayres.*

(1) 3 D. M. & G. 976. (2) 39 Ch. D. 482. (3) 39 Ch. D. 491.

G. A. S.

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In re DALISON'S SETTLED ESTATE.

[1892 D. 741]

Settled Land—Application of Capital Money—Improvement Rent-charges—Payment or Redemption—Repayment to Tenant for life of past Instalments of Rent-charges paid by him—Settled Land Acts, 1882, *s.* 21 (*ii.*) (*iii.*)—1887, *ss.* 1, 2, *and* 3—1890, *s.* 15.

Where improvements authorized by the *Settled Land Acts* have been effected upon settled land, and paid for with money borrowed, and repayable by a rent-charge, under the *Improvement of Land Act*, 1864, the Court cannot, under sect. 15 of the *Settled Land Act*, 1890, direct the trustees to apply capital moneys in their hands in repaying to the tenant for life any instalments of such rent-charge paid by him before the date at which he has required provision to be made for payment or redemption under the *Settled Land Act*, 1887.

ADJOURNED SUMMONS.

The Applicant, Mr. *M. H. Dalison*, was the tenant for life of certain estates in the counties of *Lincoln* and *Kent*, under a settlement dated the 31st of August, 1874.

Between the years 1885 and 1890, the Applicant had borrowed from the *Lands Improvement Company*, on ten separate loans, various sums amounting in the whole to £3279, which sums were expended by him in the carrying out of improvements on the settled estates authorized by the *Settled Land Acts*. The repayment of the moneys so borrowed was secured by rent-charges issuing out of parts of the settled land created under the *Improvement of Land Act*, 1864, representing in part principal and in part interest.

Mr. *Dalison*, being in ignorance of any rights which he might have under the *Settled Land Acts*, paid the rent-charges as they became due down to the present time; but on the 10th of March, 1892, he made a formal requisition to the trustees that they should in future provide for the payment of the rent-charges, and refund to him his past payments out of capital moneys in their hands, and, upon their declining to do so without the direction of the Court, he took out this summons, asking for a declaration that any moneys in the hands of the trustees being capital moneys under the *Settled Land Acts*, 1882 to 1890, or applicable

as such, might properly be applied by the trustees (*a*) in payment of all future instalments, whether consisting of principal or interest, of the several rent-charges; or (*b*) in payment of any sums required for the redemption of the said rent-charges respectively, including therein any sum payable by way of bonus for redemption; and in either case (*c*) in payment to the Applicant of all instalments, whether consisting of interest or principal, already paid by him in respect of such rent-charges respectively.

The summons came before Mr. Justice *Stirling*, in Chambers, on the 16th of May, 1892, when he made a declaration that the trustees might properly apply capital money in redeeming the rent-charges or in paying them as from the 10th of March, 1892, and directed the rest of the summons to stand over with liberty to apply to restore it, in order that the point might be considered whether or not the Court could make an order under sect. 15 of the *Settled Land Act*, 1890, for the repayment to Mr. *Dalison* of the sums paid by him in respect of the rent-charges previous to the 10th of March, 1892. The summons was subsequently adjourned into Court, and now came on for hearing.

Crawley, for the tenant for life:—

Sect. 15 of the Act of 1890 gives the Court power, in a proper case, to direct capital money to be applied in or towards payment for any improvement authorized by the Acts of 1882 to 1890. I submit that such an order may be made whether the improvements are in fact unpaid for, or whether the tenant for life has executed the improvements and paid for them out of his own pocket, or whether he has borrowed the money to pay for them under the *Improvement of Land Act*, 1864, or however else.

Under sect. 15 of the Act of 1890, the Court has a discretion to make the order, and only has to be satisfied that an improvement has been executed and that the case is a proper one for the exercise of the jurisdiction. The section is a remedial one. It was felt to be a hardship that a tenant for life should not be able to obtain repayment except where a scheme had been submitted to the trustees, and the section was intended to remove that disability. The fact of having to come to the Court affords ample protection to the remaindermen. "Payment for any improvement"

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does not necessarily mean payment to the person who has executed the improvement. If the improvement is one which is authorized by the Act, then it is immaterial how the payment has been made. The object of the Legislature was to relieve the tenant for life of an unfair burden where he has really improved the estate by putting money into it, and I submit that the Court is justified in making the order asked for under sect. 15.

[He cited *In re Knatchbull's Settled Estate* (1); *In re Hotchkin's Settled Estates* (2); *In re Lord Sudeley's Settled Estates* (3); *In re Lord Egmont's Settled Estates* (4); *In re Howard's Settled Estates* (5); and the *Settled Land Acts*, 1882, ss. 21 (ii.), (iii.), 25, 26, 28, 30, 33; 1887, s. 1; 1890, s. 15.]

W. C. Druce, for the trustees, did not oppose the application.

STIRLING, J.:—

The numerous statutes which have been passed for the purpose of amending the *Settled Land Act*, 1882, make it somewhat difficult to ascertain the meaning and intention of the Legislature with reference to the various applications which are from time to time made under those Acts; but I think the present application must fail.

The Act of 1882 authorized the application of capital money arising thereunder in various ways. One way is mentioned in sect. 21 (ii.) of the original Act, viz., "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land." Another way is mentioned in sub-sect. iii. of the same section, viz.: "In payment for any improvement authorized by this Act."

After the passing of the original Act the question arose which was decided in the case of *In re Knatchbull's Settled Estate* (6). In that case improvements had been effected under the *Land Drainage Act*, 1849, and the *Improvement of Land Act*, 1864, and had been paid for by money raised upon rent-charges created

(1) 29 Ch. D. 588.
(2) 35 Ch. D. 41.
(3) 37 Ch. D. 123.
(4) 45 Ch. D. 395.
(5) [1892] 2 Ch. 233.
(6) 27 Ch. D. 349; 29 Ch. D. 588.

under those Acts, and the application was that capital money arising under the *Settled Land Act*, 1882, might be applied in discharge of the incumbrances. It was held by the Court of Appeal that the rent-charges so created were not "incumbrances affecting the inheritance of the settled land" within the meaning of sect. 21, sub-sect (ii.), and that the tenant for life was not entitled to have them paid out of capital money, so as to relieve him from the payment of the instalments. Thereupon the Legislature altered the law by passing the *Settled Land Act*, 1887, sect. 1 of which provides, that "Where any improvement of a kind authorised by the Act of 1882 has been or may be made, either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." It is to be observed that the Legislature did not enact that these rent-charges should be deemed to be "incumbrances affecting the inheritance" within the meaning of sect. 21, sub-sect. (ii.) of the Act of 1882; but that capital money expended in redeeming such rent-charges should be deemed to be applied in payment for improvements authorized by the Act of 1882. Accordingly, it was held by the Court of Appeal, in *In re Lord Egmont's Settled Estates* (1) that by sect. 1 of the Act of 1887 capital money might be applied in payment of instalments of terminable rent-charges for which the tenant for life was liable. But I have held in *In re Howard's Settled Estates* (2), that that section is not retrospective in its operation. My decision in that case was given upon the Act of 1887 alone; and I adhere to it. It is now submitted that I ought to make the order asked for in this case on the ground that it is sanctioned by sect. 15 of the Act of 1890. In order to understand the meaning of that section, it is necessary to refer to the case of *In re Hotchkin's Settled Estates* (3), in which it was held that capital money could not be applied in recouping to a tenant for life

(1) 45 Ch. D. 395. (2) [1892] 2 Ch. 233. (3) 35 Ch. D. 41.

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money paid for improvements executed by him without first submitting a scheme to the trustees and obtaining their approval. That being the state of the law, the Legislature passed the amending Act of 1890, by sect. 15 of which it is provided that "the Court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorized by the *Settled Land Acts*, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval. as required by the Act of 1882, to the trustees of the settlement or to the Court." Now, all that was intended by the Legislature there was simply to remove the blot revealed by *In re Hotchkin's Settled Estates* (1); but it is said that I ought to hold that sums already paid by a tenant for life in respect of instalments of these rent-charges should be treated as payments for improvements authorized by the *Settled Land Acts*. Now, by sect. 1 of the Act of 1890, that Act is to be construed as one with the Acts of 1882 to 1887; and I must, therefore, read it as if it formed part of a single Act, comprising the whole of the Acts, and, in particular, sect. 1 of the Act of 1887. That being so, I have now to say whether sums already paid by the tenant for life in respect of instalments of improvement rent-charges can be treated as payments for improvements authorized by the Acts and therefore payable out of capital money; and it seems to me that that is not the true construction of sect. 15. The Act of 1887 draws a distinction between moneys paid in redemption of such rent-charges and payments for improvements. Moneys paid in redeeming or providing for payment of such rent-charges are only to be "deemed" to be applied in payment for improvements. They are not payments for improvements in fact. It seems to me, therefore, that I should be unduly straining the words of sect. 15 if I were to hold that the present application is justified by it. I do not think the case comes within that section, but within sect. 1 of the Act of 1887. The third part of the summons, therefore, fails, and must be dismissed.

Solicitors: *Markby, Wilde, & Johnson.*

(1) 35 Ch. D. 41.

G. A. S.

VENABLES *v.* BARING BROTHERS & CO.

KEKEWICH, J.

[1891 V. 201.]

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May 31; *June* 1.

Negotiable Instrument—Law Merchant—Railway Bond—Bond payable to Bearer—Collateral Mortgage—Bonâ fide holder for Value—Loss—Advertisement—Negligence.

In 1873 an American railroad company employed *B. & Co.*, a firm of bankers in *London*, as their agents for the issue of a series of bonds under their corporate seal. By each bond the company acknowledged itself to be indebted to two named trustees or "bearer" in a principal sum which would be due, and the company "would pay to the holder" of the bond, on the 1st of May, 1903, at the office of *B. & Co.*; and the company "further promised" to pay 6 per cent. interest half-yearly at the said office in accordance with the annexed coupons, which were payable to "bearer." It was further stated on the face of the bond that it and the other bonds of the series were secured by a mortgage of even date made by the company to the trustees upon the company's railroad and property connected therewith. This mortgage contained various provisions for the protection of the bond-holders, including a provision that in case of default in payment of interest for ninety days, the principal on all the bonds should forthwith become due and payable.

In 1883 some of the bonds were stolen from *B. & Co.*'s counting-house, and the firm immediately advertised the loss. In 1891 the agents in *Paris* of the Plaintiff, a banker in *London* and *Paris*, advanced a sum of money to a customer who deposited with them as security some of the stolen bonds, neither the Plaintiff nor his agents being at the time aware that the bonds had been stolen. *B. & Co.* subsequently gave notice to the Plaintiff that they were stolen, and refused to pay the interest thereon, whereupon the Plaintiff brought an action against them and the railroad company to establish his title to the bonds:—

Held, that the bonds were negotiable instruments according to the law merchant; and that, notwithstanding the advertisement of the loss, the Plaintiff had not obtained them under such circumstances as to disentitle him to claim as a *bonâ fide* holder for value.

Mere negligence on the part of the transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor, cannot be pleaded as a defence to an action on the instrument by the transferee.

THE Plaintiff, *Alfred Venables*, was a foreign banker carrying on business in *London* and *Paris*. The Defendants, *Baring Brothers & Co.*, were bankers in *London*, and the Defendants, the *South and North Alabama Railroad Company* (hereinafter referred

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to as "the *Alabama Company*"), and the *Louisville and Nashville Railroad Company* (hereinafter referred to as "the *Louisville Company*"), were two American companies carrying on business in the *United States* of *America*, the lines of the former company being worked by the latter.

In 1873 the Defendants, Messrs. *Baring Brothers & Co.*, were appointed by the Defendants, the *Alabama Company*, as their agents in *London* for the issue of a series of £200 bonds of such company called the "Six per cent. first mortgage sinking fund loan," the payment of the bonds and of the interest coupons attached being guaranteed by the *Louisville Company*.

The following is a copy of one of the bonds:—

"*United States* of *America*.
South and North Alabama Railroad Company.
State of *Alabama*.

£200 sterling. £200 sterling.

Six per cent. First Mortgage Sinking Fund Loan, limited to £1,100,000.

In Bonds. No. 1*a*. No. 5500 of £200 each."

"The *South and North Alabama Railroad Company*, a corporation created by the State of *Alabama*, hereby acknowledges itself to be indebted to *John B. Smith* and *J. Pierpoint Morgan*, or bearer, in the sum of £200 sterling money of *Great Britain*, for money borrowed by said company for purposes duly authorized by its charter and by law, which will be due, and said company will pay to the holder of this bond, on the 1st day of May, 1903, at the office of *Baring Brothers & Co.*, in the city of *London*; and said company further promises to pay interest upon said sum from the 1st day of May, 1873, free of any *United States* government tax, semi-annually on the 1st days of May and November, at the rate of 6 per cent. per annum, at the said office of *Baring Brothers & Co.*, in *London*, in accordance with the coupons for such interest hereto annexed, upon presentation and surrender of such coupons.

"This bond is one of a series of 5500 bonds of like amount, date, and tenor, numbered consecutively from 1 to 5500, inclusive, making £1,100,000 sterling in the aggregate, issued

and to be issued by said company for money borrowed as aforesaid, each of which bonds is equally secured by a mortgage of even date herewith made by said company to *John B. Smith* of *Louisville*, and *J. Pierpoint Morgan* of the city of *New York*, as trustees upon the railroad of said company extending from *Montgomery* to *Decatur* in the State of *Alabama*, a distance of about 183 miles, with the rolling-stock thereof, and the appointments, and all the property, rights and franchises connected therewith, which mortgage is duly authorized by law, and has been duly executed and delivered to the trustees, and recorded in the several counties through which the said railroad runs, and the same is a first mortgage upon all the property and franchises therein"—except as to a small amount of outstanding bonds secured by a former mortgage, and to meet which provision was made as therein mentioned. "The redemption of the bonds of this issue is further provided for by the pledge by said company to said trustees of a sinking fund of 1 per cent. per annum, the first payment whereof shall be made the 31st of December, 1875, and payable annually thereafter by said company.

"This bond, in order to be entitled to the benefit of said mortgage security, must be certified by the trustees to be one of the bonds issued under said mortgage."

The bond was executed under the seal of the *Alabama Company*, and attested by the president and secretary at *Montgomery, Alabama*, on the 1st of May, 1873, and countersigned by *Baring Brothers & Co.*

The coupons attached were in the following form:—

"The *South and North Alabama Railroad Company* will pay to the Bearer, free of *United States* government Tax, six pounds sterling, at the office of *Baring Brothers & Co.*, in the City of *London*, on the 1st day of May, 1903, being six months interest on first Mortgage Sinking fund Bond.

"*Henry M. Bush.*
"Secry. and Treas."

The bond was indorsed as follows:—

"We certify that this is one of the 5500 Bonds for £200

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sterling each, issued under and entitled to the security of the Mortgage dated the 1st of May, 1873, from the *South and North Alabama Railroad Company* to *John B. Smith* and *J. Pierpoint Morgan*, as trustees.

"*John B. Smith*, } Trustees."
"*J. Pierpoint Morgan*, }

The bond was also indorsed by the following guarantee of the *Louisville Company*:—

"The *Louisville and Nashville Railroad Company*, being the lawful owner and holder of the written bond, and being about to sell and negotiate the same, hereby, in pursuance and by authority of a resolution of its board of directors and of a resolution of its stockholders, duly passed at a regular stockholders' meeting, doth guarantee to the purchaser or holder of this bond and of the accompanying coupons respectively, the punctual payment of such bonds, together with the coupons attached to the same, as they respectively mature, according to the tenor, in the same manner and to the same extent as if this bond were itself the direct obligation of the said *Louisville and Nashville Railroad Company*."

This guarantee was expressed to be executed under the seal of the *Louisville Company*, and attested by its president and secretary.

The mortgage security referred to in the bond was created by an indenture of mortgage, made the 1st of May, 1873, between the *Alabama Company* of the first part, and *John B. Smith* and *J. Pierpoint Morgan* of the second part, whereby it was witnessed that in order to secure the due and punctual payment of the 5500 bonds for £200 each, and of the coupons for the interest thereon, to the persons or corporations who for the time being should be the owners and holders or lawfully entitled to demand and receive payment of the same respectively, without preference or priority, the *Alabama Company* conveyed their railroad, and all the property, rights, privileges, and franchises connected therewith, and all their rolling-stock, unto *Smith* and *Morgan*, as trustees for the use of the several persons who should be or become the owners and holders of, or entitled to demand and

receive payment of, the said 5500 bonds and the said coupons attached thereto equally, *pro ratâ*, and without preference or priority, and upon the trusts, uses, and purposes, and subject to the conditions and provisions thereinafter expressed and declared—that is to say, first, that so long as there should be no default in payment of either interest or principal on any of the bonds or coupons, the *Alabama Company* should be entitled to retain the possession of the railroad and other property thereby conveyed; secondly, the *Alabama Company* covenanted for payment of all taxes on the property conveyed and for further assurance; thirdly, that in case of a local change in any part of the line, and of both parties releasing any part that might be abandoned, the company would substitute land of equal value; fourthly, that the company would form a sinking fund for the purchase of any of the bonds; fifthly, that in the event of the company failing for ninety days to pay the coupons for the semi-annual interest on any of the bonds issued under and secured by the mortgage, as the same might become due, after the presentation and domand thereof, then and in that case the whole principal sum mentioned in each and all of said bonds should forthwith become due and payable, and the lien thereby created for the security and payment thereof might at once be enforced, and on a request of a majority of the holders of the bonds the trustees might take possession of the property, use and operate the same, receive the earnings, maintain proceedings for foreclosure or sale, and out of the net proceeds pay off the outstanding bonds; sixthly, that on payment in full of bond debt and interest, the deed should become void; and seventhly, there was a power of appointing new trustees.

This deed was executed by both parties.

In November, 1883, 105 of the *Alabama* bonds were stolen, together with a large number of other bonds and securities, from the *London* counting-house of Messrs. *Baring*. Immediately after the robbery Messrs. *Baring* issued upwards of 1000 handbills giving notice of the robbery and of the distinguishing numbers of the stolen bonds, and that payment thereof had been stopped. These handbills were supplied to all the principal stockbrokers and bankers in *London*; and in December, 1883,

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copies of such notices were supplied to the chief bankers in *Paris*. On the 18th, 19th, and 20th of December, 1883, Messrs. *Baring* advertised the robbery and the numbers of the stolen bonds in six *London* daily newspapers. In January, 1886, Messrs. *Baring* executed to the two railroad companies a deed of indemnity against all claims in respect of the 105 stolen bonds and coupons. Towards the end of 1889 reports appeared in the daily newspapers of the trial at the Central Criminal Court of two persons for altering one and for receiving others of the stolen securities.

On the 2nd of March, 1891, the Plaintiff's agents in *Paris* advanced to a customer of theirs, named *E. Wunder*, the sum of 50,000 frs., equivalent in English money to £2000, upon the security of a deposit with them by *Wunder* of twelve of the *Alabama Company's* bonds. Of these twelve bonds ten happened to form part of the stolen bonds, though it was said that neither the Plaintiff's agents, nor the Plaintiff himself, were at that time aware of the fact. It appeared that the loan transaction was carried out entirely at the Plaintiff's office in *Paris* by his joint managers there, the Plaintiff personally taking no part in it. From the evidence it appeared that *Wunder* had gained the confidence of the Plaintiff's managers by having for some time previously frequented the office for the purpose of effecting certain monetary transactions with them, and that the loan was made in the ordinary course of business and without any inquiries as to *Wunder's* position or as to how the bonds had come into his possession.

The actual circumstances under which the loan to *Wunder* was effected were proved to be shortly as follows: On the 2nd of March, 1891, *Wunder* called at the Plaintiff's office in *Paris*, and asked the managers to advance him the 50,000 frs. on the security of twelve *Alabama* bonds which he produced from his pocket. One of the managers took the bonds and consulted the *Bulletin Officiel des Oppositions*, a paper taken in by French bankers for the purpose of informing them as to lost or stolen securities. Seeing no mention of the bonds in the *Bulletin*, and having no suspicion that they were not in order, the manager told *Wunder* that he should have the sum required, and the same was then paid to him as above stated. While this manager was

agreeing with *Wunder* as to the terms of the loan, the other manager was writing out the form of receipt which *Wunder* signed on receiving the money.

On the 12th of March, 1891, the Plaintiff received from Messrs. *Baring* notice that the ten bonds in his possession had been stolen from them in November, 1883, and were their property; whereupon, in consequence of their refusal to pay the interest thereon, the Plaintiff brought this action against Messrs. *Baring* and the two railroad companies, claiming, amongst other relief, a declaration that the ten bonds in question and the coupons attached thereto were his property as against the Defendants.

In his statement of claim the Plaintiff alleged that the bonds were negotiable instruments payable to bearer, with coupons attached likewise payable to bearer, and that the bonds and coupons had been received and held by him in good faith and in the ordinary course of his business and for good and valuable consideration.

In their statement of defence Messrs. *Baring* denied that the bonds or coupons were properly payable to bearer or were negotiable instruments, either in *America*, *France*, or the *United Kingdom*, or elsewhere, or that the delivery of the bonds or coupons by a person having no title thereto would confer a title upon any person to recover the money secured by, or to retain, the bonds or coupons. They then described their efforts to trace the stolen bonds by handbills and advertisements as already mentioned, and stated in paragraph 4 that the robbery and the numbers of the securities stolen were, in fact, "matters of common knowledge among bankers in *England*, *France*, and generally." And they further alleged, in paragraph 8, that under the circumstances the Plaintiff at the time of his advance had notice that the bonds had been stolen from them, and that, if the Plaintiff in fact carried on his banking business without using the ordinary precautions as to lost or stolen bonds and securities, he was, by reason of such negligence, disentitled to claim as a purchaser or mortgagee without notice; also that the stolen bonds never were the property of *Wunder*, the depositor, or of the person who stole them, or any person claiming through him, and that the Plaintiff

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had no better title than the person or persons through whom he claimed.

The action now came on for trial. Evidence was given on behalf of the Plaintiff by business men that bonds of the nature of those in question were always treated as negotiable instruments. An American lawyer called by the Plaintiff stated that according to the settled doctrine of the *United States* Courts, bonds payable to bearer, with or without coupons attached, were to be treated as negotiable instruments, and that purchasers of such bonds in good faith were not affected by want of title in the vendor.

Finlay, Q.C., *Warmington*, Q.C., and *F. M. Abrahams*, for the Plaintiff:—

It is clear upon the evidence that these bonds are negotiable instruments according to the law merchant, and that the Plaintiff or his agents acquired them in good faith and for value. The case is therefore covered by the decisions of the House of Lords in *London Joint Stock Bank* v. *Simmons* (1); *Goodwin* v. *Robarts* (2). *Crouch* v. *Crédit Foncier of England* (3) will probaby be relied on by the Defendants; but that was a different case to the present: it was the case of a "debenture," and the conditions attached to it were of a nature inconsistent with a negotiable instrument. Even if the Plaintiff neglected all due precautions when he took the bonds—but of which there is no evidence—negligence, unless it is gross negligence amounting to fraud, cannot be pleaded as a defence to an action on a negotiable instrument: *London Joint Stock Bank* v. *Simmons*; *Raphael* v. *Bank of England* (4); *Jones* v. *Gordon* (5).

Renshaw, Q.C., and *Stock*, for the Defendants *Baring Brothers & Co.*:—

There are two questions—first, are these bonds negotiable instruments? and, secondly, what results follow from the way in which they came into the Plaintiff's hands? The first question

(1) 8 Times L. R. 478; [1892] A. C. 201.
(2) 1 App. Cas. 476.
(3) Law Rep. 8 Q. B. 374.
(4) 17 C. B. 161; 25 L. J. (C.P.) 83.
(5) 2 App. Cas. 616.

must be decided by English, and not by American, law: *Picker* v. *London and County Banking Company* (1); *Williams* v. *Colonial Bank* (2). The bond in this case is not negotiable in the sense of passing as cash from a person who has stolen it. It contains the elements of a contributory mortgage as well as that of a promissory note, and the mortgage fixes an earlier date for payment of the principal in case of default in payment of the interest, than that fixed by the bond. It is quite clear that a mortgage debt cannot be split up and assigned apart from the mortgage, or be made negotiable in the sense contended for.

[KEKEWICH, J.:—Why is the instrument less negotiable because collateral rights are attached to it? Suppose Parliament were to secure the issue of *Bank of England* notes by a charge on the bank premises, would bank-notes be less negotiable?]

That would depend on the terms of the Act of Parliament. If there is a condition affecting the whole of the instrument, either by way of benefit or limitation, it is not negotiable in the ordinary sense. The requisites of a promissory note are explained in *Byles* on Bills (3); *Chalmers* on Bills of Exchange (4); *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 41), s. 83, sub-s. 3; *Stamp Act*, 1870 (33 & 34 Vict. c. 97), s. 49; *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (5); *Carlos* v. *Fancourt* (6); *Storm* v. *Stirling* (7); *Jury* v. *Barker* (8); and *Willans* v. *Ayers* (9). Taking the provisions of this bond and the mortgages together, the bond is something more than an instrument passing from hand to hand, giving, as it does, a right to participate in the benefit of a collateral mortgage and in the proceeds of sale of the mortgaged property. No authority has yet gone the length of holding a bond of this kind to be a negotiable instrument according to the law merchant, and we submit it cannot be so treated consistently with the decision of the Court of Queen's Bench in *Crouch* v. *Crédit Foncier of*

(1) 18 Q. B. D. 515.
(2) 38 Ch. D. 388, 403; 15 App. Cas. 267.
(3) 14th Ed. p. 13.
(4) 4th Ed. p. 265.
(5) 21 Q. B. D. 352.
(6) 5 T. R. 482, 485, 486.
(7) 3 E. & B. 832, 841.
(8) E. B. & E. 459.
(9) 3 App. Cas. 133.

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England (1)—which is still good law—and *London and County Banking Company* v. *London and River Plate Bank* (2).

The loss of the bonds was advertised, and a trial relating to the robbery of some of them was reported in the daily newspapers, which the Plaintiff must be taken to have read: *Boydell* v. *Drummond* (3). Under the circumstances, we submit that the Plaintiff had such notice, and was guilty of such negligence, that he is disentitled to claim as a purchaser for value.

Crawley, for the Defendants, the railroad companies.

KEKEWICH, J.:—

The argument for the Defendants, Messrs. *Baring*, has proceeded upon two points only. It has been argued, first, that the documents in question are not negotiable instruments for the purpose of such a claim as this; and, secondly, that, even supposing them to be negotiable instruments, the Plaintiff's conduct has been such, and the circumstances within his knowledge were such, that he cannot be permitted to recover from the Defendants in this action.

The two points, of course, are essentially distinct, and the second does not arise unless the first is decided in the Plaintiff's favour. The negotiability of the instrument must depend, to some extent at least, upon the instrument itself. It is called a bond: it has been called a bond throughout the proceedings; and that is the name which is given to it by the language of the instrument. Though it is called, and not improperly, a bond, it is in form a certificate of indebtedness with a promise to pay; the principal money being payable on a day named some years henceforward, and the interest being payable half-yearly on the days mentioned in the coupons annexed. And here it may be convenient to say that I am dealing entirely with the principal instrument, the bond, because much of the argument that was addressed to me on this part of the case would not be directly applicable (perhaps not applicable at all) to an action on one of the coupons detached.

(1) Law Rep. 8 Q. B. 374.
(2) 20 Q. B. D. 232.
(3) 2 Camp. 157; 11 East, 144, note (a).

A bond of the character I have mentioned—given by a foreign railroad company, in this case, as in some others, an American railroad company, and made on the face of it payable to bearer—was not argued to be otherwise than a negotiable instrument. It would be impossible, having regard to decided cases, and to the common knowledge touching this branch of the law, to have addressed any such argument with a reasonable chance of success. But it was said this is not a bond or instrument simply of that character: this is not a promise to pay on a certain day, with interest in the meantime; but there are annexed to it certain limitations and conditions which modify its character and prevent it being a negotiable instrument. Such limitations and conditions as there are owe their origin and effect entirely to a deed of trust, which is referred to in the bond, and which, no doubt, is deemed of considerable importance to the bond-holders. That deed constitutes a trust, and the trustees are thereby appointed on behalf of the bond-holders, with certain powers and provisions intended to be for their security. But those provisions, so far as they were said to affect the negotiability of the bond, are divided into two classes. It is said that some of them are in the nature of a limit to the interest or powers of the bond-holder, and that the others are for his benefit; and that those others, being for his benefit, cannot be attached to the instrument without destroying its negotiable character, because such limitations cannot pass with the bond from hand to hand. It seems to me unnecessary to determine whether any limitations and provisions for the benefit of the bearer of a bond like this can be passed with the bond, or what can and what cannot be passed. I think that the negotiable character of the bond depends on the bond itself, and that, unless you have on the face of the bond something which shews that there is attached throughout a limitation essential to it which cannot pass, the negotiability, if otherwise established, stands unaffected, notwithstanding that the bond-holder may not be able to enforce the provisions of the collateral instrument. I put one or two cases during the argument; and it seems to me that the analogy of a case, such as I suggested, of a provision, either by Act of Parliament or by deed, to secure bank-notes, was, perhaps, like

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all other analogies, though not perfect, still good by way of illustration.

But the argument was also rested on the provisions given to the bond-holder in this way. This bond was to run for a certain time, until a date in 1903; but there is a provision in the deed that, if the interest shall not be paid within a certain number of days—ninety days—after becoming due, then the principal shall become payable at once, notwithstanding that the time fixed by the bond has not arrived—a provision of a very common character, which we are all familiar with in this class of instrument; and it is said that prevents the negotiability of the instrument, because it comes to this—it is a promise to pay, not on a certain day, but on a day which may or may not arrive within the time mentioned in the bond.

It seems to me that provision simply comes to this—that the promise to pay is on a day named in 1903, or on such earlier day as by the provision of the bond it shall become payable; and I cannot see any reason for holding that a limitation such as that interferes with the negotiability of the bond.

In the cross-examination of the *United States'* lawyer whom we had in the box, reference was made to the provision in the deed for a sinking fund, which was also for the benefit of the bond-holder; but that was not relied on in argument, and, even if it had been, it would have come within the class of provisions which I have mentioned before; either the bond-holder can or he cannot enforce the provision for his benefit; but in neither case does it seem to me to affect the negotiability of the bond.

One or two cases were referred to: one was *London and County Banking Company* v. *London and River Plate Bank* (1), which was decided on the express ground that there there was on the face of the document an intention expressed that it should pass by transfer and not by delivery. If there had been anything of that kind here, that would have destroyed at once the negotiability; but, on the contrary, here I have a case of an entirely different character, for everything on the face of the document goes to shew that the intention was that it should pass by delivery.

The other case mainly relied on by the Defendants was *Crouch*

(1) 20 Q. B. D. 232.

v. *Crédit Foncier of England* (1), where the debenture on which the plaintiffs sued is set out in full, and from an inspection of it one sees at once the reason for the decision. There, there were conditions subject to which the debenture was expressly made, and which were incorporated in it, and which were conditions of such a character that they were inconsistent with a negotiable instrument according to law merchant, and according to the authorities cited in Lord *Blackburn's* judgment. That does not seem to me in any way to touch this case.

That case was also mentioned upon the question whether there is sufficient evidence here of a custom of negotiability. I think, although I have the advantage of the evidence of a lawyer respecting the law of the *United States* and of the law of *Alabama*, I may pass that over, because any question of that kind is got rid of by the case of *Picker* v. *London and County Banking Company* (2), about which Lord Justice *Lindley*, in *Williams* v. *Colonial Bank* (3), says this: "Now, can it be said that these banks have acquired by English law a title to these certificates? If so, how have they got it? Assume for the moment that in *America* certificates indorsed like these are treated as negotiable instruments, that would not make them negotiable instruments in this country. That was decided by *Picker* v. *London and County Banking Company*, but authority is hardly wanted for so very obvious a proposition."

So that the only question I have to consider is whether they are negotiable according to the law merchant, as part of the Common Law of *England*. On this point I have had the evidence of several gentlemen competent to speak, and they say they have no doubt about the matter at all.

Then it is said—and for that purpose reference was made to *Crouch* v. *Crédit Foncier of England*—the custom is recent; or, in other words, the practice is of such recent origin that that is not strong enough to form a custom, because these bonds were not issued till 1873, and that was such a short time ago that there has not been time to form a custom. It seems to me, as regards that, one is entitled to know, and I do know, what has

(1) Law Rep. 8 Q. B. 374. (2) 18 Q. B. D. 515.
(3) 38 Ch. D. 388, 403.

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been the practice among merchants respecting other bonds of a like nature. This is a very small issue, and if one were to hold that, in order to make these bonds negotiable, one must find a custom established with respect to these particular bonds of this particular railway company, it might be in this and other cases impossible to establish custom at all. There might not only be a small number of them, but also, and I daresay it is so, not a very large market; and it might take very many years to establish a custom if one might not refer to what happens as regards other like bonds. Now, I am told by those competent to speak, that this bond is in a common form; that other railway companies of *America* issue bonds of a like character substantially the same, and that bonds of like character issued by other railway companies do pass as negotiable, and that they have done so within the witnesses' experience. I think I am bound by evidence of that character, as confirming the evidence I have respecting these particular bonds; and upon that evidence I have no hesitation in holding—it would be impossible to hold otherwise—that they have acquired in *England*, in the City of *London*, among English merchants, the character of negotiability. That disposes of the first point.

Now the second point is at least as important. It is said that Mr. *Venables*, acting through his agent in *Paris*, accepted these bonds as security under circumstances which prevent his now saying that he took them in good faith. It is pleaded, of course, by the Plaintiff, that he did take them in good faith, and the point is raised by the Defendants. It is raised in a somewhat peculiar way in paragraph 8 of the defence.

[His Lordship read the paragraph, and continued:—]

That is the point made by that paragraph, and the point that has been made mainly in the evidence and in the argument. But there is another point made in the pleadings which I think it necessary to notice, because it is one which goes to the root of matters of this kind, and is of a wider character than the one I have just mentioned. It is suggested in paragraph 4 of the defence, that the robbery and the numbers of the securities stolen were, in fact, matters of common knowledge among bankers.

I am not prepared to say the Court or a jury would not hold that some matters are of common knowledge among bankers, and that other matters are of common knowledge among merchants, and similarly with regard to other classes of the community. This has occurred to me as an illustration. I think it would be extremely difficult to persuade me, and I take it it would be extremely difficult to persuade any jury, that any banker in the City of *London*, or, indeed, anywhere in *England*, did not know that on a particular day the bank rate of discount was of a certain amount, and had been changed from, say, 4 to 5 per cent. I think it is probable that a jury would hold it was a matter of common knowledge among bankers that such an event had occurred; but when I am asked to hold that the robbery of certain securities from Messrs. *Baring* (the robbery which apparently took some time to elucidate) was common knowledge, and still more when I am asked to hold that it was common knowledge that the subject of the robbery was bonds of this particular company, that they were bonds of these particular numbers, and that a banker is supposed to know, when certain bonds are tendered to him, that they bear the numbers of those stolen from Messrs. *Baring* some time before, that seems to me such a large extension of common knowledge that one necessarily hesitates to class it in that category.

A case has been cited in which it was held, or suggested rather than held, that, if it were proved that a man was in the habit of reading daily a certain newspaper, it might be concluded that he did read it on a certain day, and therefore had notice of something contained in the issue of that particular day. It may be that a jury would be justified in coming to such a conclusion; but one would have to look at all the surrounding circumstances before coming to such a conclusion, and I have nothing of that kind here. What I have of notice of that kind is publication in divers newspapers, of which some may have been, and some certainly were not, within the purview of the Plaintiff; and there is not shewn to be any paper at all, or any publication whatever, which amounts to notice to the world of such facts as I have here to consider. There is a French paper alluded to, which was consulted, and which, I understand, French bankers always consult.

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How far it is valuable, or how far it is trustworthy, I do not consider. It was consulted, and the fact of these bonds having been stolen was not mentioned in it—a fact which rather points to its not being quite so exhaustive as it is supposed to be. But be that as it may, there is no duty cast on a banker to consult any particular publication, and notice cannot be proved against him in that manner. So I get rid of common knowledge, and I get rid of the notice.

Now I come to the question of negligence. I was referred to the case of *Raphael* v. *Bank of England* (1), which is certainly a case in point; because there there was a bank-note—undoubtedly a negotiable instrument—and it was held that the holder might sue upon it, notwithstanding that when he took it he had means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself. Negligence was there held to be no defence whatever, and I apprehend that principle is really the guide to all the decisions.

The judgments in *London Joint Stock Bank* v. *Simmons* (2) are valuable, because they contain statements which put the law again on a proper footing in the eyes of those who cannot follow the cases through their different courses in the Courts; but they do not lay down any new law. There were two cases that went to the House of Lords before that: one was *Williams* v. *Colonial Bank* (3), which I have already mentioned; and the other was *Earl of Sheffield* v. *London Joint Stock Bank* (4). In neither of those two cases is there, so far as I am aware, either in the Courts below, or in the House of Lords, any statement impugning the Common Law doctrine which makes negligence no defence to an action on a negotiable instrument. There were special circumstances in *Earl of Sheffield* v. *London Joint Stock Bank* which induced the House of Lords to bring home to the bank in that case knowledge of the bad title of their depositor, and the House of Lords declined to extend that to the case of the banker in *London Joint Stock Bank* v. *Simmons*; but the general prin-

(1) 17 C. B. 161.
(2) 8 Times L. R. 478; [1892] A. C. 201.
(3) 38 Ch. D. 388; 15 App. Cas. 267.
(4) 13 App. Cas. 333.

ciple, the broader doctrine, was not impugned in words so far as my recollection of those cases goes—and I have looked at some part of them again—and I believe has never been intended to be impugned in any way. Negligence is not a defence in such an action; but, even if it were, it is difficult to see that the Plaintiff has been negligent in this case. There is some obscurity as to the circumstances of this case. The question is whether, before the day on which the money was advanced on the faith of these bonds—that is, before the moment of the advance—Mr. *Venables*, through his agent in *Paris*, was aware that these bonds were in fact stolen, so that their depositor could not make a good title to them, notwithstanding their negotiability. I have no evidence before me that either the Plaintiff or his agent had any such knowledge; and, therefore, I must hold that the Plaintiff is entitled to the declaration he asks—namely, a declaration that these particular bonds, with particular numbers and the coupons attached thereto, are his property as against the Defendants; and he must have the costs of the action.

Solicitors: *Michael Abrahams, Son, & Co.; Mullens & Bosanquet.*

G. I. F. C.

BRISCOE *v.* BRISCOE.

[1891 B. 893.]

Practice—Costs—Solicitor—Lien—Assignee—Charging Order—Attorneys and Solicitors Act, 1860 (23 & 24 *Vict.* c. 127), *s.* 28 [*Revised Ed. Statutes, vol. xviii., p.* 881].

Under sect. 28 of the *Attorneys and Solicitors Act*, 1860 (23 & 24 Vict. c. 127), the assignee of a solicitor employed by the Plaintiff in an action may apply for and obtain a charging order on the property recovered in the action for the costs incurred to such solicitor and assigned by him to the applicant.

Baile v. *Baile* (1) reluctantly followed.

Savage v. *James* (2) explained.

ADJOURNED SUMMONS.

This was an application by *Frederick Hall*, as the assignee of a solicitor who had become bankrupt, that it might be declared

(1) Law Rep. 13 Eq. 497. (2) L. R. 9 Eq. 357.

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that the solicitor, as the solicitor employed by Mrs. *Amy Septima Briscoe*, the Plaintiff in the action, was entitled to a charge upon certain chattels recovered for her in the action for the taxed costs, charges, and expenses of the solicitor of, and in reference to, that and other actions. The action had been brought by Mrs. *Briscoe* against her husband for the recovery of certain moneys, and the solicitor had acted for her in that action as well as in the others. Eventually the action was compromised by an agreement between the parties, dated the 22nd of October, 1891, under which the Defendant was to deliver up certain chattels enumerated in the schedule thereto, and which were thereby declared to be the Plaintiff's sole and separate property.

Previously, on the 16th of July, 1891, the solicitor had assigned to the present Applicant, *F. Hall*, by way of mortgage to secure an advance, all and singular the book debts due and owing to him, the solicitor, in respect of his business as a solicitor, and the amounts and particulars whereof were set out in a schedule to the mortgage. The schedule was headed "Particulars of costs due to" the solicitor, one of the items being a sum estimated at about £300 due from his client, Mrs. *Briscoe*, for costs in the present and other actions.

The solicitor having since become bankrupt, *Hall*, his mortgagee, took out the present summons for a charging order as above mentioned.

Eustace Smith, for the Applicant:—

I ask for a charging order, under sect. 28 of the *Attorneys and Solicitors Act*, 1860 (23 & 24 Vict. c. 127) (1). Under that

(1) Sect. 28 of 23 & 24 Vict. c. 127, so far as it is material, is as follows:—

"In every case in which a solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of Justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference

section and the common law a solicitor is clearly entitled to a lien on the property he recovers for his client in an action. That lien he may assign or charge, otherwise he would be in a worse position than any other person having a lien, so that virtually he would be deprived of the benefit of the Act.

[KEKEWICH, J.:—The question is whether the Act gives a right of lien to any person other than the solicitor himself.]

I submit the Act empowers the Court to charge a fund in favour of a person other than the solicitor himself. In *Baile* v. *Baile* (1) it was held that the lien given by the Act was not merely personal to the solicitor, but was transmissible to his legal personal representative. There is no express decision that the assignee of a solicitor's bill of costs can get a lien or charge, but it seems that under sect. 37 of the *Attorneys and Solicitors Act*, 1843 (6 & 7 Vict. c. 73), the assignee can sign the bill and sue upon it in his own name: *Ingle* v. *M'Cutchan* (2); *Cordery* on Solicitors (3). The solicitor's right of lien is a right he has at common law: the Court does not give it, but only declares it.

[KEKEWICH, J.:—You are coming here seeking to enforce your statutory power under sect 28 of the Act of 1860, not your common law lien. You must shew that you have a right under the statute.]

The statute does not create the lien, but only enables the Court to say it shall attach to a particular property or fund. The right of lien itself exists independently of the statute. I submit that there is no distinction in principle between the case of the personal representative of the solicitor, as in *Baile* v. *Baile*, and the assignee by deed of the solicitor, as in the present case. Sect. 28 does not, I submit, create any difficulty, for it does not say that the applicant for a charging order must

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to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper. . . ."

(1) Law Rep. 13 Eq. 497.
(2) 12 Q. B. D. 518.
(3) 2nd Ed. p. 288.

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necessarily be the solicitor himself, but only that the Court may declare the solicitor to be entitled to a charge upon the property recovered. The Court may, therefore, say here that the solicitor was entitled to a charge, and that on the evidence the benefit of that charge is now vested in the Applicant, his assignee.

Vernon R. Smith, for the Plaintiff:—

I submit that a solicitor has no such common law lien as has been suggested, for in *Savage* v. *James* (1) it was held that chattels personal not under the control of the Court or in the possession of the plaintiff's solicitor were not subject to a lien for his costs incurred in the suit by means of which the chattels had been recovered. The Applicant must, therefore, rely solely on the statute of 1860, and the word "assignee" does not appear in that statute at all, though it does appear in the statute of 1843. Moreover, the terms of sect. 28 seem to imply that the application for a charging order must be made by the solicitor, because the person who is to have the charge is the solicitor himself. *Baile* v. *Baile* (2) does not go far enough, for it only applies to the case of a legal personal representative, who takes by operation of law whatever right and securities the solicitor had. The case of an assignee by deed is different. It is asked here that a solicitor may be declared to have a charge for costs which he had parted with. If, in point of fact, the solicitor is entitled to a charge, then the application is unnecessary, and the Applicant ought to pay the costs of it. I ought not to pay costs occasioned by the solicitor having become bankrupt and by the consequent proceedings.

Eustace Smith, in reply.

KEKEWICH, J.:—

This summons raises a question of some difficulty. The action was brought by the Plaintiff against the Defendant, her husband, for the recovery of certain moneys, and by an agreement of compromise certain chattels were to be delivered up to her. The assignee of her solicitor in the action seeks by this summons to obtain a charge upon those chattels for his costs.

(1) I. R. 9 Eq. 357. (2) Law Rep. 13 Eq. 497.

The first question is, whether the Applicant was entitled to take out this summons at all: in other words, whether his title to a charging order is good. He is the assignee of the Plaintiff's solicitor, and he says: "Being the assignee of costs due to the solicitor, I am entitled to a charging order." To this it is replied: "A charging order is a creature of statute; and sect. 28 of the statute 23 & 24 Vict. c. 127, says that, where a solicitor is employed to prosecute or defend any action, it shall be lawful for the Court 'to declare such solicitor entitled to a charge upon the property recovered or preserved;'" and the argument is that that does not give the Court power to declare a charge in favour of an assignee of the solicitor. There is some reason for that apart from the construction of the statute, for, in the first place, the solicitor has parted with the costs in respect of which a charge is asked in his favour; but there is this still stronger reason, that a statute conferring jurisdiction on the Court must be construed strictly; and, therefore, if you do not find the jurisdiction in this statute, you cannot find it at all. That argument appears to me to be of considerable force; and if I had been left entirely to myself I should have been disposed to adopt it. But I am not left to myself. The question came before Vice-Chancellor *Wickens* in *Baile* v. *Baile* (1). There a charging order was sought in the suit on behalf of the legal personal representative of the solicitor, and the Vice-Chancellor held that the representative was entitled to a charge, rejecting the argument that the right was personal to the solicitor, on the ground that the right to a lien or charge must be correlative to the right of taxation, and as the legal personal representative was entitled to taxation he was entitled to a lien. That, as I understand, was the basis of his reasoning. Applying that case to the present, the assignee is made by sect. 28 liable to taxation, and therefore he also has a right of lien. The power of a solicitor to assign costs is extremely clear, and is recognised by statute, and the case of *Ingle* v. *M'Cutchan* (2) shews what the practice has been.

In Mr. *Morgan's* argument for the defendants in *Baile* v.

(1) Law Rep. 13 Eq. 497. (2) 12 Q. B. D. 518.

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Baile (1), the point is put in this way: "Until the Legislature passes another statute extending the right to present a petition of this kind, now possessed by his solicitor, to his legal personal representatives—either executors or administrators—they cannot do so." That argument was, as I have said, rejected by the Vice-Chancellor. Whatever my own opinion might have been apart from that case, I feel bound now to hold that the assignee of a solicitor is entitled to a charging order. I go no further than to say I should have been disposed to yield to Mr. *Morgan's* argument; but the Vice-Chancellor's decision is overwhelming. Therefore I hold that the Applicant in this case is entitled to sue for a charging order.

In the case of *Savage* v. *James* (2), which has been referred to, it was held that chattels not under the control of the Court were not subject to a solicitor's lien; but that case was decided expressly on the analogy of *Shaw* v. *Neale* (3), where it was held that real estate was not within the law of lien. That does not apply here.

In the present case the chattels were "recovered" within the meaning of the *Solicitors Act*: that is to say, they were obtained by the Plaintiff in the litigation. I think, therefore, the Applicant is entitled to a charging order on these chattels for the amount of the costs of this action; but I give him no costs as against the Plaintiff. I do not hesitate to say that I do not think the Court ought unduly to encourage applications based on the assignment of costs in favour of persons who may or may not be worthy persons.

Solicitors: *Farman & Dumas; J. H. Moggridge.*

(1) Law Rep. 13 Eq. 497, 506. (2) I. R. 9 Eq. 357.
(3) 20 Beav. 157; 6 H. L. C. 581, 601.

G. I. F. C.

In re HENRY CLAY AND BOCK AND COMPANY.

KEKEWICH, J.

1892 July 26.

Trade-mark—Old Mark—Alteration—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 92—*Name or Initials of Proprietor—Discretion of Court—Essential and Non-essential Particulars.*

A trade-mark registered as an old mark ought to be registered and kept registered just as it was used, and, in the absence of special circumstances rendering alteration necessary, no alteration of such mark ought to be allowed.

The circumstance that the proprietor of an old mark, whose name or initials form part of such mark, has transferred to another person the business in connection with which the mark has been used, is not sufficient to induce the Court to allow an alteration of the mark by substituting the name or initials of the new proprietor for the name or initials of the former proprietor.

THIS was an application by *Henry Clay and Bock and Company, Limited,* proprietors of the registered trade-mark No. 13,000, asking that they might be at liberty to add to and alter the mark by omitting therefrom the letters "*A. L.*" and substituting therefor the words "*Julian Alvz,*" or in the alternative omitting the letters "*A. L.*" and leaving the space a blank, with permission, when using the mark, to insert in that space the words "*Julian Alvz.*"

The mark in question was, on the 22nd of August, 1877, registered in *Great Britain* by *Antonio Lopez* as an old mark used by him in his business of a cigar merchant in connection with the sale of cigars known as "*La Paz de China.*" The mark as so registered contained the letters "*A. L.,*" being the initials of *Antonio Lopez.*

The trade-mark and goodwill of the business were subsequently transferred to *Julian Alvarez,* who in 1883 obtained in *Havanna* the registration of a mark similar to the mark No. 13,000, with the exception that the letters "*A. L.*" were removed and the name of *Julian Alvarez,* abbreviated as "*Julian Alvz,*" was substituted therefor, and the trade-mark as thus altered continued to be used by *Julian Alvarez* and by his successors in business, and cigars marked therewith were sold both in *Havanna* and in *England.*

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In 1889 the trade-mark and business were transferred to the Applicants, and since the transfer the trade-mark had been extensively used upon cigars manufactured by them as the successors in business of *Julian Alvarez.*

The Comptroller declined to sanction the proposed alteration on the ground that, having regard to recent decisions, the alteration was not one which could be effected under sect. 92 of the *Patents, Designs, and Trade Marks Act*, 1883.

Warmington, Q.C., and *McKenna*, for the Applicants:—

The objection on the part of the Comptroller is that the proposed alteration is a material alteration in an old mark, which ought not to be allowed. But sect. 92 of the *Patents, Designs, and Trade Marks Act*, 1883, under which the application is made, is perfectly general in its terms, and applies to old marks as well as to new marks, and the only limitation which the section imposes on the power of the Court is that the particular altered must not be "an essential particular" within the meaning of the Act. The expression "essential particular" has reference to sect. 64, which deals with both old and new marks, and while it defines essential particulars in the case of new marks, contains a proviso expressly excluding old marks from the effect of that definition.

[KEKEWICH, J.:—That is to say, the essential particulars of an old mark are necessarily different from those of a new mark, because an old mark may not have any of the essential particulars which the Act requires in new marks: see *In re Hopkinson's Trade-mark* (1).]

Words which merely indicate the proprietorship in the mark cannot be regarded as an essential particular. The expression "essential particulars" occurred in sect. 10 of the *Trade Marks Registration Act*, 1875, and the effect of it is considered by Lord *Cairns* in *Orr-Ewing* v. *Registrar of Trade Marks* (2).

It is clear that some alteration in an old mark must be allowed under sect. 92, as otherwise the operation of that section would have been limited to new marks; and, in fact, alterations in

(1) [1892] 2 Ch. 116 (2) 4 App. Cas. 479, 484.

old marks have been allowed: see *Ex parte Walker* (1), where iron works at *Dudley* were removed to *Netherton*, and the Court allowed the name of the latter place to be substituted for that of the former. And so in *In re Guinness & Co.'s Trade-mark* (2), where the word "Limited" was allowed to be added to the name of the proprietors, who had been converted into a limited company. *In re Phillips' Trade-mark* (3) will be relied on as an authority against us; but the decision in that case proceeded on several grounds, and the observations of Mr. Justice *Chitty*, to the effect that old marks must be registered just as they were used prior to August, 1875, ought not to be read as enunciating a general proposition, but as applicable only to a case in which an alteration in an essential particular is sought. In that case the Court in its discretion refused to allow an alteration by striking out the important words "trade mark," as your Lordship in *In re Adams' Trade-mark* (4) refused to allow the word "patent" to be struck out. On the other hand, *In re Phillips' Trade-mark* is an express authority that alteration of an old mark may be allowed under sect. 92.

[They referred also to *Hammond & Co.* v. *Malcolm, Brunker & Co.* (5).]

Sir *R. E. Webster*, A.-G., and *Ingle Joyce*, for the Comptroller-General, were not called upon.

KEKEWICH, J.;—

To my mind, there is an obvious distinction in principle between an old mark and a new mark for the purpose of such an application as the present. The 92nd section of the *Patents, Designs, and Trade Marks Act*, 1883, says that, "The registered proprietor of any registered trade-mark may apply to the Court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of this Act, and the Court may refuse or grant leave on such terms as it

(1) Sebastian's Digest, p. 381, No. 624.
(2) 5 Rep. Pat. Cas. 316.
(3) [1891] 3 Ch. 139.
(4) W. N. (1892) p. 40; 9 Rep. Pat. Cas. 174.
(5) 9 Rep. Pat. Cas. 301.

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may think fit"; and it is difficult to see how such a provision, referring to any registered trade-mark, can be limited to a new mark. On the other hand, what is to guide the Court in deciding whether the addition or alteration is to be refused or granted is the consideration whether the particular in respect of which the addition or alteration is asked is an essential particular within the meaning of this Act; and when we turn back to the description of essential particulars in sect. 64, we find that the essential particulars there described, as was equally the case in the preceding Act, include particulars for purposes of registration which are not required as regards old marks, and some little doubt and confusion has crept into the Act in that way. I endeavoured to explain my views on that in the case which has been cited of *In re Adams' Trade-mark* (1)—not, I am disposed to think, with any great success. But there is this difference, which must guide the Court in applications of this kind. Mr. Justice *Chitty* distinctly said, in *In re Phillips' Trade-mark* (2), referring to *In re Guinness & Co.'s Trade-mark* (3), that the 92nd section authorizes such an addition as he allowed in the last-mentioned case, *Guinness's* trade-mark being an old mark. I am content, without further inquiry, to consider that sect. 92 does allow an addition to or alteration of an old mark. But when you approach an old mark you do so from this point of view. Those who have registered an old mark are not bound to comply with the Act now in force, nor were they bound to comply with the Act which preceded it as regards details, including essential particulars. The user before August, 1875, was the test; and provided that user was established the trade-mark was allowed to be registered; and, if I may venture to say so, rightly, without the essential particulars required for registration of a new mark; and the consequence of that is put by Mr. Justice *Chitty* in the first reason in *In re Phillips' Trade-mark* (4). He says: "First, because the mark, being claimed as an old mark, ought to be registered just as it was used, and to strike out the words '*trade mark*' would, in the circumstances of the case, be to allow an

(1) W. N. (1892) p. 40; 9 Rep. Pat. Cas. 174.

(2) [1891] 3 Ch. 139.

(3) 5 Rep. Pat. Cas. 316.

(4) [1891] 3 Ch. 143.

alteration which, though it may be of a non-essential particular, would be a material alteration." The trader being entitled to register an old trade-mark, without conforming to the rules of the Act as to new trade-marks, is bound to register what he has used—something depending on user, and not to register something which has not been used, and which has, therefore, become a new mark, and though, in the case last cited, Mr. Justice *Chitty* relied more on the second of the three reasons which he assigned, yet he did rely on the first reason, and, for the present purpose, the first reason seems to me to be conclusive.

But it may be said that that goes too far, and that some alteration or addition is allowed and may be reasonably necessary. That is quite true. It seems to me to follow, and *In re Guinness & Co.'s Trade-mark* (1) was a good example of that. There the registered proprietors of the trade-mark had become a limited company, and it was desired to add the word "Limited" to their names, so as to preserve the trade-mark while preserving the trade. I do not think it is mentioned in the report, and possibly may not have been mentioned in Court, but it must have been present to the minds of all engaged in the case, that if the Messrs. *Guinness* had not been allowed to alter their trade-mark, they would have been obliged to give it up altogether, because under the *Companies Act*, 1862, they were bound under penalties to use the word "Limited"; and if they were not allowed to alter their trade-mark by adding that word, they could not have used the mark at all. There were, therefore, urgent reasons for allowing the alteration in that case. Many other cases may very likely have occurred of a similar character coming within the same lines.

But the argument in the present case goes much further. The proprietor of a trade-mark may have sold his business, or bequeathed his business; or, in another case, it may have passed by bankruptcy to a trustee, who, it may be, is carrying on the business for the benefit of the creditors, and, according to the argument—the only argument which could support the present application—on every such occasion the new proprietor would be entitled to come to the Court and say: "This trade-mark had

(1) 5 Rep. Pat. Cas. 316.

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formerly the name of the original proprietor on it; the original proprietor has now changed; he was *John*, he is now *James*; therefore an alteration must be made by substituting *James* for *John*." Or it might be said: "The proprietor was a man of one name; he has sold the business to a man of an entirely different name with different initials and a different abbreviation, and the mark must be altered so as to preserve the trade-mark in the new proprietor." That seems to me entirely and altogether inconsistent with the idea of an old trade-mark, and I fail to see any urgent reason for the alteration. We all know that a business is often carried on in the name of an old firm, notwithstanding that those who originally composed the firm are dead or have retired long since; and if I were to grant the present application I might be required in a very short time to grant another. *Julian Alvarez* may transfer to another name. I do not think it ought to be allowed. I think that to allow it would be directly to contravene the principle which Mr. Justice *Chitty* laid down, and to which I desire to express my adhesion. A mark registered as an old mark ought to be registered and kept registered just as it was used, in the absence of any special circumstances occurring from time to time which may render alteration necessary. I do not think that the transmission of title in this case does render the proposed alteration in any way necessary, and I therefore refuse the application.

Solicitors: *McKenna & Co.; The Solicitor to the Board of Trade.*

C. C. M. D.

In re LAXON & CO. (2).

VAUGHAN WILLIAMS, J.

1892

June 25, 27.

[0030 of 1892.]

Company—Registration—Memorandum of Association—Subscription by Infants—Certificate of Incorporation—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18 [*Revised Ed. Statutes, vol. xiv., pp.* 203, 206.]

The contract of an infant being not void, but only voidable, his signature to the memorandum of association of a company is the signature of a "person" within the meaning of sect. 6 of the *Companies Act,* 1862 (which requires such a memorandum to be signed by seven or more persons); and, on the certificate of incorporation being obtained, the company is validly incorporated, and subsequent avoidance of the infant's contract does not invalidate the registration of the company or any intermediate acts affecting the rights of third persons. The certificate of incorporation is not conclusive to prevent the objection that the memorandum was not signed by seven persons.

In re Nassau Phosphate Company (1) followed.

In re National Debenture and Assets Corporation (2) distinguished.

A COMPANY called *W. Laxon & Co., Limited,* was in 1891 registered under the *Companies Acts,* 1862 to 1890, as a company with limited liability, and with a capital of £5000, divided into £5 shares.

The registered office of the company was at *Bank Chambers, High Street, Coventry.*

The Registrar of Joint Stock Companies issued his certificate of incorporation on the 22nd of June, 1891.

The memorandum of association was signed by eight persons, including *G. E. Barnard* and *C. W. E. Barnard,* both of whom were then, and also at the date of the hearing of the winding-up petition mentioned below, under the age of twenty-one years.

On the 25th of February, 1892, a petition was presented by creditors of the company in the County Court of *Warwickshire,* holden at *Coventry,* stating that the company had been incorporated and registered under the *Companies Acts,* and asking that it might be ordered to be wound up on the ground of its insolvency.

(1) 2 Ch. D. 610.

(2) [1891] 2 Ch. 505.

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On the 12th of April, 1892, leave was given to the Petitioners to amend their petition, by praying in the alternative that the company might be ordered to be wound up as an unregistered company under Part VIII. of the *Companies Act*, 1862, on the ground that it was never duly incorporated, as the memorandum of association had not been signed by seven "persons" within the meaning of sect. 6 of that Act.

On the 6th of May, 1892, on the application of *G. E. Barnard* and *C. W. E. Barnard*, by their next friend, under sect. 35 of the *Companies Act*, 1862, Mr. Justice *Stirling* ordered that the register of members of the company should be rectified by removing therefrom the names of the applicants in respect of all the respective share or shares registered in their names.

On the 21st of May, 1892, Mr. Justice *Vaughan Williams*, on the application of the petitioning creditors, made an order in Chambers that the petition should be transferred to the High Court of Justice (Companies Winding-up), and this order was affirmed by the Court of Appeal on the 22nd of June, 1892.

The amended petition was heard before Mr. Justice *Vaughan Williams* on the 25th and 27th of June, 1892, at which time the company, if a company under the *Companies Act*, 1862, consisted of more than seven but less than twenty members.

Levett, Q.C., and *Eve*, for the Petitioners:—

There were eight signatures to the memorandum of association; but the names of two of the persons who signed have been removed from the list of contributories. The question is, whether the company can be wound up as an unregistered company under Part VIII. of the *Companies Act*, 1862, or whether it is, and must be wound up as, a duly registered company. By sect. 4 of the *Companies Act*, 1862, no company of more than ten persons is to be formed to carry on the business of banking unless registered under the Act, or formed in pursuance of some other Act, or of letters patent; and no company of more than twenty persons is to be formed to carry on any other business for gain unless so registered or formed, or unless it is a mining company within the jurisdiction of the Stannaries. Sect. 5 divides the Act into nine parts, of which Part I. relates to the "Constitution and Incorpora-

tion of Companies and Associations under this Act," and Part VIII. to the "Application of this Act to Unregistered Companies." The material sections of Part I. commence with sect. 6, which provides that "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability." Sect. 7 points out the mode of limiting the liability of the members; and sect. 8 says that the memorandum of association of a company limited by shares "shall contain" certain "things"—statements as to name, place of business, &c.—"subject to the following regulations," of which the second is, "That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes." Sect. 11 requires the memorandum to be stamped as if it were a deed, and "to be signed by each subscriber," and attested, the effect being that when registered it binds the company and the members as if the latter had covenanted under hand and seal to perform its conditions subject to the Act. Sect. 16 states the requisites as to stamping and signing and the effect of the articles of registration. Sect. 17 provides that the memorandum and the articles (if any) shall be delivered to the Registrar of Joint Stock Companies, who is to retain and register the same; and, by sect. 18, on registration of the memorandum and articles, "The Registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company"; and the same section enacts that "A certificate of the incorporation of any company, given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Two of the persons subscribing the memorandum were infants, and there was, therefore, no valid incorporation of a limited company under the Act of 1862. But, as there are more

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than seven and less than twenty members, the company may be wound up as a partnership or unregistered company under sect. 199, the 1st section in Part VIII. of the Act.

Such an order was made where, as here, an infant subscriber of the memorandum of association was struck off the list of contributories: *In re Hertfordshire Brewery Company* (1). This company, if an association of persons neither incorporated nor privileged by the Act or the Legislature, is a partnership: *Lindley* on Companies (2). In order that such a partnership may become a limited company, the Act requires the effectual association of seven or more persons; an invalid association is not sufficient. Those who are associated together must be persons capable of performing the obligations of the Act, such as meeting, voting, making payments, and managing the affairs of the company; and infants are not such persons.

[They were stopped.]

Chadwyck Healey, Q.C., and *R. Younger*, for the company:—

The petition to wind up the company as an unlimited company was the result of an after-thought. The company has always been treated as a registered company with limited liability. The certificate of registration as such a company was given before the Petitioners and other creditors traded with it. They dealt with it as a limited company, and petitioned to have it wound up as a limited company; and now they wish to go behind all this and make persons pay their debts to whom they never looked for payment. The application to remove the names of the infants from the list of contributories was made also, on the assumption that the company was duly registered with limited liability, by persons invoking a jurisdiction which they now repudiate.

Sect. 18 of the *Companies Act*, 1862, shews that the certificate of registration is conclusive. The word "requisition" includes the compliance with sect. 6, and not merely the delivery of the memorandum and articles to the Registrar and payment of his fees, under sect. 17. The very point, whether, where one of the seven signatories of the memorandum is an infant, the certificate is conclusive, has been decided in the affirmative by

(1) 43 L. J. (Ch.) 358. (2) 5th Ed. p. 1.

Hall, V.C.: *In re Nassau Phosphate Company* (1). That was a stronger case than this, because here the application to remove the names was made after petition presented; whereas there the infant's name had been removed from the list of contributories before the winding-up petition was presented. That decision has never been questioned, but has been approved by Mr. Justice *Kekewich* in *In re National Debenture and Assets Corporation* (2), and by eminent text-writers: *Lindley* on Companies (3); *Buckley* on Companies (4). Irrespective of the certificate being conclusive, it is a good ground for the decision that the contract of an infant is not void, but only voidable.

But Lord *Cairns*, L.J., held that, even when a memorandum of association had been altered, after being signed, in such a way as to annihilate the original signature, the certificate of registration was conclusive: *Peel's Case* (5).

[VAUGHAN WILLIAMS, J.:—But Lord Justice *Kay* says that the words of sect. 18 "do not mean that if less than seven persons subscribe their names to a memorandum, and by some oversight on the part of the Registrar obtain registration of a pretended company so formed, the certificate of the Registrar shall be conclusive that that was a corporation": *In re National Debenture and Assets Corporation* (6).]

Eve, in reply:—

The word "persons" in a statute does not mean those who, though called persons in law, have no capacity to do that to which the statute relates: *Pharmaceutical Society* v. *London and Provincial Supply Association* (7). Sect. 6 means that the memorandum must be signed by seven persons capable of binding themselves by the covenant implied by sect. 11. Even if the infant's contract is only voidable, when it is avoided it is avoided *ab initio*.

[VAUGHAN WILLIAMS referred, as to the difference between

(1) 2 Ch. D. 610.
(2) [1891] 2 Ch. 505, 514.
(3) 5th Ed. p. 30.
(4) 5th Ed. p. 6.
(5) Law Rep. 2 Ch. 674.
(6) [1891] 2 Ch. 505, 519.
(7) 5 App. Cas. 857.

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void and voidable contracts, to *Pollock* on Contracts (1), and *Oakes* v. *Turquand* (2).]

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I confess I do not understand how the decision and the judgments of the Court of Appeal in *In re National Debenture and Assets Corporation* (3) can be reconciled with the decision and words of the judgment of Lord *Cairns* in *Peel's Case* (4).

If I had to choose between them, I think I should more easily follow the judgment of Lord *Cairns*; but I do not think that I should be properly performing my duty here by following that judgment if I thought that the decision of the Court of Appeal in *In re National Debenture and Assets Corporation* was applicable to the matter in hand; because when there is a decision, so recent as 1891, by the Court of Appeal, I think it is my duty to assume that it is right, and to follow it loyally, even though I may think that an earlier decision is based on sounder reasoning or sounder law.

But I am happy to say that I am not in this case placed in the position of having to choose between the two decisions. I should say, before pointing out why I am not put in that position, that *Peel's Case* does not seem to have been cited in argument in the Court of Appeal in *In re National Debenture and Assets Corporation*. I do not know that that is of very great importance, because I cannot but conceive that a Court consisting of Lord Justice *Lindley*, Lord Justice *Bowen*, and Lord Justice *Kay* must have been perfectly familiar with the decision in *Peel's Case*, even although it was not called to their attention—in fact, Lord Justice *Lindley*, in his book on Company Law (5), seems to have given some attention to that judgment; but I cannot help thinking that at the time he wrote his book he took a different view of the effect of the decision in *Peel's Case* from that which he took when he delivered judgment in *In re National Debenture and Assets Corporation*.

But I really need not trouble myself with these matters at

(1) 5th Ed. pp. 59, 60.
(2) Law Rep. 2 H. L. 325.
(3) [1891] 2 Ch. 505.
(4) Law Rep. 2 Ch. 674.
(5) 5th Ed. p. 111.

all, because I do not think that the decision in *In re National Debenture and Assets Corporation* (1) determined the matter which I have now to determine. In that case it was suggested that the memorandum of association was not signed by the necessary seven persons, but only by six, because what purported to be the signatures of two persons were really both the signature of one person who had signed twice in different names. The Court of Appeal, after hearing evidence which had not been given before Mr. Justice *Kekewich*, arrived at the conclusion that there was no ground, in fact, for the suggestion, and that there was no difficulty at all, because seven persons had signed. But the Court of Appeal went on distinctly to decide this point of law, that the certificate of incorporation was not conclusive to prevent the objection being taken that the company was not duly incorporated, on the ground that, in fact, less than seven persons signed the memorandum of association, although the certificate of incorporation was given on the assumption that seven persons did sign. I, therefore, should be flying in the face of a decision of the Court of Appeal if I were to hold that the certificate was conclusive.

The Court of Appeal has held that the certificate is not conclusive, and I am not going to hold that it is conclusive, but that the question does not arise here, and that there is nothing in the decision of the Court of Appeal to prevent my holding that in law seven persons had signed the memorandum of association at the time when the certificate of incorporation was issued. It is admitted that eight persons purported to sign; but it is said that two out of the eight persons were infants, and that the signatures of these two persons do not bind them. It is said also that in May of this very year Mr. Justice *Stirling* made an order avoiding the contract entered into by those infants by reason of their having signed the memorandum of association.

But, as I understand, the contract of an infant is only a voidable contract. It is a valid contract until it is rescinded, and it was admitted in the course of the argument that if nothing had happened—if no order had been made, and these infants had not repudiated their contract, but on attaining their majority

(1) [1891] 2 Ch. 505.

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had assented to it—thereupon the incorporation of the company would have been valid, and sect. 6 of the *Companies Act*, 1862, would have been complied with, because seven persons would have subscribed their names to the memorandum of association. The effect of that is to shew that an infant at the time of signing is a "person" within the meaning of that section. It is quite true that he may afterwards avoid the contract which arises on his signature; but it seems to me that, unless and until he does so, he is a "person," and that, therefore, the objection to this registration fails.

The objection is founded simply on the suggestion that seven persons did not sign. I hold that seven persons did sign, and I hold that the signature of an infant is a good signature until it has been avoided. I further hold that, if anything has been done affecting the rights of third persons while that signature is unavoided, the signature is for that purpose a good signature. It may be thought that in so holding I am straining the law. I do not know whether I am or am not so doing; but if I am, this is an occasion when one ought to strain the law to any point one can without breaking the rules of law. I do not find in any of the arguments which have been addressed to me any reason why I should not hold that when an infant signs a memorandum of association his signature is the signature of a "person" within the meaning of sect. 6 of the *Companies Act* of 1862 until his contract is avoided. That is a ground which is mentioned by Vice-Chancellor *Hall* in his judgment in *In re Nassau Phosphate Company* (1), and by Mr. Justice *Kekewich* in *In re National Debenture and Assets Corporation* (2), and, under these circumstances, I now decide this case upon the same ground. That being so, I refuse to order the company to be wound up as an unregistered company.

At the request of all parties, an order was made to wind up the company as a registered company.

His Lordship gave the Petitioners the costs from the date of presenting the petition, so far as it succeeded, including the costs of the transfer from the County Court; but directed them

(1) 2 Ch. D. 610. (2) [1891] 2 Ch. 505.

to pay to the company the costs occasioned by the claim to an order for winding up the company as an unregistered company, including the costs of amending the petition, and directed the costs payable to the Petitioners to be set off against those payable by them. His Lordship refused to give any costs to creditors supporting the petition for winding up the company as an unregistered company, but gave one set of costs to the creditors opposing such application, intimating that he had not finally decided what general rule should be laid down as to the costs of parties appearing to support or oppose winding-up petitions.

Solicitors: *Field, Roscoe & Co.*, agents for *Coley & Coley, Birmingham; Powell & Rogers*, agents for *Streetly, Coventry; Warren, Murton, & Miller*, agents for *Woodcock & Co., Coventry; Sharpe, Parker, Pritchards, & Barham*, agents for *Hughes & Masser, Coventry.*

F. E.

In re NEW ORIENTAL BANK CORPORATION.

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June 25; July 2, 5.

[0038 of 1892.]
[0040 of 1892.]

Company — Winding-up — Petition for Compulsory Order — Application at Hearing for Supervision Order — Fresh Advertisement—Desirability of Compulsory Order.

Petitions were presented by an insolvent company and by one of its creditors, asking that the company might be ordered to be wound up by the Court. Before the petitions were heard an extraordinary resolution was passed for a voluntary winding-up, and at the hearing the petitioners, who were supported by a large majority of the creditors and shareholders, asked that the voluntary winding-up might be continued under the supervision of the Court:—

Held, that the hearing must be adjourned in order that fresh advertisements might be issued stating that only a supervision order was about to be asked for.

On the petition again coming on for hearing a supervision order was reluctantly granted, the advantages of a compulsory order being pointed out by the Court.

THE *New Oriental Bank Corporation, Limited*, was incorporated in July, 1884, under the *Companies Acts*, 1862 to 1883, its objects being, generally, to carry on a banking business in *London*

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and the *East*, such objects being more particularly defined by an Act of Parliament passed in 1889.

The nominal capital of the company was £2,000,000, divided into £10 shares. Only 59,800 shares were issued; but these were fully paid up.

The company having suspended payment, two petitions, one by the company itself and the other by *D. C. Campbell*, a creditor, were presented, both of which prayed that the company might be wound up compulsorily by the Court, or that such other order might be made in the premises as to the Court should seem meet.

Both petitions were answered for the 25th of June, 1892; but after they had been presented, and before they came on to be heard—viz., on the 23rd of June, 1892—the members of the company passed extraordinary resolutions for winding up the company voluntarily, and appointing *T. A. Welton* liquidator.

The members, at the same meeting, authorized the liquidator to appear on the hearing of the petitions and consent to an order that the voluntary winding-up should be continued under the supervision of the Court.

A large majority of creditors and contributories signified to the company their wish that the voluntary winding-up should be continued under the supervision of the Court.

Both petitions came on for hearing on the 25th of June, 1892.

Robinson, Q.C., and *Ingle Joyce*, for the company, asked that the voluntary winding-up might be continued under the supervision of the Court. They stated that it was believed that the company was not quite solvent, but that it was expected the creditors would be paid from 15*s.* to 17*s.* 6*d.* in the pound.

Beale, Q.C., and *Ashworth James*, for the petitioning creditors, and *Vernon R. Smith*, for shareholders, also asked for a supervision order.

VAUGHAN WILLIAMS, J.:—

I am aware that it has been the practice of the Chancery Division, where the petitioners and the creditors and contribu-

tories desire a supervision order, to make such an order. But that practice is mainly founded on decisions pronounced prior to the *Companies (Winding-up) Act*, 1890. Since then, having regard to the fact that the object of the Legislature was that creditors and contributories should have a special protection under a compulsory winding-up order which they did not enjoy before, the making of a supervision order is not now, under such circumstances, so much a matter of course as formerly. The petitions, as presented and advertised, ask for a compulsory order, and there may be many people who think that, on such an order being asked for, it will be granted. As they do not know that at the hearing a mere supervision order is to be asked for, I think the proper course is to adjourn the matter for a week. The protection of the Board of Trade is only present when a compulsory order has been made, and creditors and contributories should have an opportunity of coming forward if they desire such an order. The petitions must both stand over for a week, and in the meantime advertisements must be issued stating that at the hearing a supervision order will be asked for.

The petitions again came on for hearing on the 2nd of July, 1892, when it was stated that only one creditor, Mr. *Pratt*, a creditor for £5000, had given notice of his intention to oppose the making of a supervision order, and the petitions were again adjourned.

The applications for a supervision order were renewed on the 5th of July, 1892.

Robinson, Q.C., and *Ingle Joyce*, for the company.

Beale, Q.C., and *Ashworth James*, for the petitioning creditors.

Vernon R. Smith, *G. P. C. Lawrence*, and *Harman*, for shareholders supporting the application.

Mr. *Pratt*, in person, opposed the application, and asked that a compulsory winding-up order might be made; but there was no evidence in support of the statements made by him.

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In the case of a large concern like this, there is much to be said in favour of making a compulsory winding-up order, as in such a case the protection of the Board of Trade is obtained, and facilities are afforded for the public investigation of a company's affairs. But I cannot force the Petitioners, the company and a creditor, to take an order which they do not now ask for—namely, a compulsory order—and no creditor or other person has so far petitioned for a compulsory order. The making of an order to continue the voluntary winding-up under supervision will not prevent the Court from subsequently making a compulsory order in the event of a number of creditors, or even one of them, making out a proper case for such an order. The usual supervision order will now be made, and will be dated as of to-day.

Solicitors: *Hollams, Sons, Coward, & Hawksley; Day, Russell & Co.; Badham & Williams; Sutton, Ommanney, & Rendall.*

F. E.

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July 2, 4, 7.

In re POSTAGE STAMP AUTOMATIC DELIVERY COMPANY.

[0105 of 1892.]

Company—Winding-up—Directors—Misfeasance—Concealed Gifts from Vendor—Measure of Damages—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

The vendor of patents, to purchase and work which a company (registered without articles) was formed, agreed with *A.*, *B.*, *C.*, and *D.* that, if they would become directors and subscribe for 100 £1 shares, he would give each of them one-fifth of his profits under his agreement with the company.

One of the objects of the company, as stated in its memorandum of association, was to carry into effect its agreement with the vendor, with or without modification.

The subscribers to the memorandum of association then appointed *A.*, *B.*, *C.*, and *D.* directors, and approved the company's agreement with the vendor, so modified as to provide for the issue to *A.*, *B.*, *C.*, and *D.* of eighty out of the 100 fully paid-up founders' shares, which formed part of the consideration payable by the company to the vendor, and that the agree-

ment should not be impeached on the ground that the vendor stood in a fiduciary relation to the company, or that the directors, having accepted office at his request, did not constitute an independent board.

The modified agreement was filed under sect. 25 of the *Companies Act*, 1867, and the eighty founders' shares were then allotted to *A.*, *B.*, *C.*, and *D.*

The vendor then transferred to *A.*, *B.*, *C.*, and *D.* four-fifths of the ordinary shares, forming part of the consideration payable by the company to the vendor, and *A.*, *B.*, *C.*, and *D.*, each took and paid for 100 shares.

Except the shares allotted to the vendor and *A.*, *B.*, *C.*, and *D.*, under the modified agreement, the shares subscribed for by and transferred to *A.*, *B.*, *C.*, and *D.*, and the seven shares subscribed for by the signatories to the memorandum of association, no shares were ever issued.

All the shareholders, and *X.*, who subsequently became transferee of the vendor's remaining shares, knew of the above transactions.

A prospectus subsequently issued to the public, inviting subscriptions for shares, omitted to mention the transfer of vendor's shares to *A.*, *B.*, *C.*, and *D.*

The company afterwards went into voluntary liquidation, and the liquidator sought to have *A.*, *B.*, *C.*, and *D.* declared guilty of misfeasance, and ordered to repay the par value of all vendor's shares received by them, although such shares were then worthless:—

Held, (1) that *A.*, *B.*, *C.*, and *D.* were not liable in respect of the founder's shares; (2) that they were liable in respect of the vendor's ordinary shares received by them, because with regard to them there had been concealment from the public to whom the prospectus was issued; and (3) that such ordinary shares must be paid for at their nominal value.

THE *Postage Stamp Automatic Delivery Company, Limited*, was registered, without articles of association, on the 30th of September, 1890, under the *Companies Acts*, 1862 to 1888, as a company limited by shares.

Its capital was £5100, divided into 5000 ordinary shares of £1 each, and 100 founders' shares of £1 each.

One of the objects of the company, as stated in its memorandum of association, was "to enter into and carry into effect, with or without modifications, an agreement which has already been prepared, and which is expressed to be made between *Thomas Ralph Dowse*," therein described, "thereinafter called 'the vendor' of the one part, and the *Postage Stamp Automatic Delivery Company, Limited*, thereinafter called 'the company,' of the other part, a copy of which agreement has, for the purpose of identification, been endorsed with the signatures of the subscribers hereto; or otherwise to purchase or acquire the letters patent

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and provisional protection mentioned in the said agreement, and all extensions of the same."

The memorandum of association was signed (in respect of one share each) by *Dowse*, and by *G. R. G. Joy*, *G. Glass*, *A. S. Jones*, *W. J. Oliver*, *W. R. McKay*, and *W. Sparks*.

Some difficulty arose about getting people to become directors and shares subscribed for, and *Dowse* arranged with *Jones* that if he and three persons to be named by him would act as directors and subscribe respectively for 100 £1 shares, *Dowse* would give *Jones* and each of the three persons introduced by him one-fifth of his profits under the agreement with the company.

The agreement with the company was accordingly modified between the 13th and 17th of November, 1890, the principal modifications being those mentioned below in clauses 6 and 7. In the original agreement it was provided that the purchase-money should be £1350 in paid-up shares, and £1250 to be paid as follows—viz., £250 out of capital at the rate of 25 per cent. on subscribed capital after £1000 subscribed, and the balance of £1000 out of surplus profits after payment of a dividend for the current year at 10 per cent. on the amount paid up on the ordinary shares.

The agreement, as modified, was dated the 21st of November, 1890. Clauses 1–4 provided for the transfer of the letters patent and an unpatented invention. By clause 5 the company was to pay *Dowse*, as purchase-money, £2600, payable as to £1250 in cash, and as to £1350 in fully paid-up shares.

Clauses 6 and 7 were as follows:—

"6. The company shall cause this agreement to be registered in accordance with sect. 25 of the *Companies Act*, 1867, and immediately after such registration the company shall issue to the vendor and his nominees, as mentioned in the schedule hereto, 1350 fully paid-up shares in the capital of the company, numbered respectively 1 to 1350, both inclusive. All such shares shall be issued as fully paid-up shares, and shall be deemed for all purposes fully paid-up shares. Of such shares those numbered 1 to 100 (both inclusive) shall be founders' shares, and those numbered 101 to 1350 (both inclusive) shall be ordinary shares."

"7. The sum of £1250, balance of the purchase-money, shall

be payable as hereinafter mentioned out of the net profits of the company remaining after payment of dividends of 10 per cent. on the amount paid up (or considered to be paid up) in respect of the share capital of the company."

Clauses 8 and 9 provided as to dividends on the founders' shares and the division of the profits of the company, and the last clause and the schedule were as follows:—

"10. The validity of this agreement shall not be impeached on the ground that the vendor, as promoter or otherwise, stands in a fiduciary relation to the company, or that the directors, having accepted office at his request, do not constitute an independent board."

"THE SCHEDULE ABOVE REFERRED TO.

Numbers of Shares.	Description of Shares.	Persons to whom such Shares are to be allotted.
1 to 20 (both inclusive)	Founders' Shares	Thomas Ralph Dowse.
21 to 40 (both inclusive)	ditto	Colonel Ronald Taylor.
41 to 60 (both inclusive)	ditto	George Settles.
61 to 80 (both inclusive)	ditto	Colonel Alfred Stowell Jones.
81 to 100 (both inclusive)	ditto	Harry Smith.
101 to 1350 (both inclusive)	Ordinary Shares	Thomas Ralph Dowse."

On the 17th of November, 1890, the subscribers to the memorandum of association appointed *Taylor*, *Settles*, *Jones*, and *Smith* directors of the company, and approved the modified agreement; and as modified it was, on the advice of Mr. *Fox*, the solicitor to the company, filed with the Registrar of Joint Stock Companies, in pursuance of sect. 25 of the *Companies Act*, 1867, prior to the allotment of shares.

On the 21st of November, 1890, *Dowse* wrote to each of the four new directors as follows:—

"Provided you subscribe and pay for not less than 100 shares in the *Postage Stamp Automatic Company*, within fourteen days, I hereby agree to transfer to you 250 fully-paid ordinary shares,

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as and when the same are allotted to me, and also to give you a charge for £100 on my cash interest in the aforesaid company; such charge to be forthwith prepared by the secretary, Mr. *Barker*."

On the 9th of December, 1890, 1250 fully paid-up ordinary shares were allotted to *Dowse*, and 20 founders' shares each to *Dowse*, *Smith*, *Jones* and *Settles*, and *Taylor*.

On the 16th of December, 1890, *Dowse* transferred to each of the four new directors 250 of the ordinary shares received by him as vendor, and wrote to each of them as follows:—

"In consideration of our agreement, I undertake to pay you, out of the sum of £1250 payable to me in cash by the *Postage Stamp Automatic Delivery Company*, under an agreement filed with the Registrar of Joint Stock Companies, the sum of £100. The same to be paid proportionately, with other payments by the company, under the said agreement; and I agree to this charge being forthwith filed with the *Postage Stamp Automatic Delivery Company, Limited*."

H. Barker, the secretary of the company, was aware of all the facts above stated, except the letter of the 21st of November, 1890, and the arrangment by which *Smith*, *Jones*, *Settles*, and *Taylor* assented to become directors and to subscribe for 100 shares each.

Smith, *Jones*, *Settles*, *Taylor*, and *Dowse* each took and paid for 100 £1 shares; and these shares, and the seven subscribed for in the memorandum of association, were the only other shares issued.

In June, 1891, *Dowse's* shares were transferred to one *Boeken*, who was aware of all the arrangements between *Dowse* and the new directors.

A prospectus printed by the directors, but apparently not issued to the public, stated as follows:—

"Capital £5100, divided into 5000 ordinary shares of £1 each, and 100 founders' shares of £1 each. 3245 £1 ordinary shares are now offered for subscription; the directors and others having already subscribed for the remainder of the shares."

Neither this prospectus, nor a prospectus issued to the public in June, 1891, inviting further subscriptions, mentioned the transfer of shares by the vendor to the directors, or the agreement to pay cash.

Mr. Justice *Vaughan Williams* found as a fact that it was intended to conceal these facts from the public, but not from the subscribers to the memorandum, who knew that the new directors were to share profits with *Dowse*.

An extraordinary resolution for voluntary winding-up was passed on the 1st of April, 1892, and an order was afterwards made to continue the voluntary winding-up under the supervision of the Court.

The creditors of the company were very few besides *Jones, Smith, Settles,* and *J. Taylor,* and the principal creditor was *H. Barker,* for services as an accountant.

On the 3rd of May, 1892, a summons was issued by *H. Barker,* who was the liquidator and former secretary of the company, "That it may be declared that each of them, the said *H. Smith, N. R. Taylor, A. S. Jones,* and *G. Settles* was guilty of misfeasance and breach of trust, in relation to the company, in accepting, by way of gratuity, a gift from *T. R. Dowse,* the promoter of and vendor to the company, 270 fully paid-up shares of £1 each, being part of the consideration payable and paid by the company to the said *T. R. Dowse,* under an agreement dated the 21st of November, 1890, and made between the said *T. R. Dowse* of the one part, and the company of the other part; and that each of them, the said *H Smith, N. R. Taylor, A. S. Jones,* and *G. Settles,* is liable, and may be ordered, to pay to the company and the liquidator thereof the sum of £270, together with interest thereon at the rate of £4 per cent. per annum, from the 21st of November, 1890, until payment," and that the Respondents may be ordered to pay the costs.

Eve, in support of the summons:—

The application is made under sect. 10 of the *Companies (Winding-up) Act,* 1890, the provisions of which are substantially the same as those of the repealed sect. 165 of the *Companies Act,* 1862. Directors taking secret gifts from the vendor were guilty

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of misfeasance within the meaning of the repealed section: *Buckley* on Companies (1). Neither of the prospectuses disclosed the fact that a large proportion of the vendor's consideration was to be returned to the directors, and the letter of the 16th of December, 1890, omits to mention that any of his ordinary shares were to be transferred to them. The Respondents are liable to repay the full nominal value of the shares with interest.

T. L. Wilkinson, *Swinfen Eady*, and *Peterson*, for the Respondents:—

The principle is clearly laid down that if a director receives a bribe, gift, or gratuity, he is liable, as for misfeasance, to make it good; and a colourable purchase is a bribe. But what was done here was not a gift, but a plain *bonâ fide* business transaction, and was not colourably done to conceal a bribe. Supposing however, that what was done was irregular, the shares given being of no value whatever, the liquidator cannot recover anything from the Respondents: *Eden* v. *Ridsdales Railway Lamp and Lighting Company* (2); *Nant-y-Glo and Blaina Ironworks Company* v. *Grave* (3); *Carling's Case* (4).

Barker, the liquidator, cannot complain, for he was an officer of the company, and knew the shares were worth nothing. The principle on which the directors have been made liable is that they have acted as agents of the company: *Parker* v. *McKenna* (5); *Hay's Case* (6). But this was a private company; the directors were principals, not agents; everybody concerned was aware of what was being done, and the persons sought to be made liable are really the company itself. No shareholder was prejudiced, and under such circumstances the liquidator cannot call on the directors to account for what they have received: *In re British Seamless Paper Box Company* (7).

Eve, in reply:—

The knowledge of the person who is now liquidator is imma-

(1) 6th Ed. p. 406.
(2) 23 Q. B. D. 368.
(3) 12 Ch. D. 738.
(4) 1 Ch. D. 115, 126, 127.
(5) Law Rep. 10 Ch. 96, 118.
(6) Ibid. 593, 601.
(7) 17 Ch. D. 467.

terial. There is a plain case of concealment by the directors of the fact that they were sharing in what the vendor obtained from the company. If so, they were acting in a position in which they could not fulfil their duties as independent directors. The measure of damages is the value of what was taken placed on it by the parties at the time, and the shares must be taken as at their par value and as having been issued as fully paid-up: *Pearson's Case* (1). Otherwise they were issued at a discount, and the Respondents would still be liable: *In re Almada and Tirito Company* (2).

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The facts of the case seem to be the following: Mr. *Dowse*, an inventor, having conceived the notion that large profits might be made by the sale to the public, at a penny each, of memorandum books, accompanied with a penny postage stamp, which stamp and book should be automatically delivered to purchasers placing a penny in the slot of an automatic machine—such profits to be made by the payment for advertisements appearing in the memorandum books—and, being possessed of certain patents for automatic machines, was minded to give effect to his notion by promoting a company to purchase his patents and the benefit of his notion. For this purpose he got six gentlemen, including Colonel *Jones*, one of the Respondents, to sign the memorandum of association of a company named the *Postage Stamp Automatic Delivery Company*, which company was incorporated on the 30th of September, 1890. The memorandum of association, in clause 3, sub-sect. (*a*), stated that one of the objects for which the company was established was to enter into and carry into effect, with or without modifications, an agreement already prepared, expressed to be made between *Dowse* and the company, and identified with the signatures of the subscribers of the memorandum. After the incorporation some difficulty seems to have arisen as to obtaining directors and the subscriptions for shares necessary to start the operations of the company, and the result was that further proceedings were on the point of being abandoned, as appears by the entry under date the 10th of November, 1890, in

(1) 5 Ch. D. 336. (2) 38 Ch. D. 415.

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the bill of costs of Mr. *Fox*, who was acting on behalf of the promoters of the company. But Mr. *Dowse*, in order to get over the difficulties, arranged with Colonel *Jones* that if he and three other gentlemen, to be introduced by him, would act as directors of the company, and subscribe respectively for 100 £1 shares in the company, he (*Dowse*) would give to Colonel *Jones*, and each of the other gentlemen introduced by him, a one-fifth share in his profits under the agreement with the company. This necessitated a modification in the agreement mentioned in the memorandum of association, and, between the 13th and 17th of November, 1890, the agreement was accordingly modified, the principal modifications being as follows: In clause 6 the words "his nominees as mentioned in the schedule" were substituted for "as he may direct," and a schedule was added to the modified agreement, there being no schedule to the original agreement. By that schedule it appears that twenty founders' shares, part of the price payable to the vendor, were to be allotted to Colonel *Jones* and the same number to each of the gentlemen introduced by him. The object of this alteration seems to have been to make it appear on the face of the agreement that some consideration was being paid, or some gift was being made, by *Dowse* to these gentlemen. There is also a modification of clause 7 which seems to be a modification to the disadvantage of the vendor. On the 17th of November, 1890, the subscribers to the memorandum of association appointed the four Respondents directors of the company, and the modified agreement was approved. The agreement, as modified, was executed as of the 21st of November, 1890, and registered before the allotment of shares, by the advice of Mr. *Fox*, in order to comply with sect. 25 of the Act of 1867. On the 9th of December, 1890, 1250 ordinary shares, fully paid, were allotted to *Dowse*, and twenty founders' shares to each of the four Respondents and to *Dowse*. On the 21st of November, 1890, a letter was written by *Dowse* to each of the four Respondents in the following terms. [His Lordship read the letter, and continued as follows:—] and on the 16th of December, 1890, *Dowse* transferred to each of the Respondents 250 of the ordinary shares received by him as vendor, and wrote to each of the Respondents a letter in the following terms: [His Lordship read

the letter of the 16th of December, 1890, and continued:—] In my opinion, Mr. *Barker*, the liquidator, who was then secretary of the company, was aware of all the preceding facts excepting the letter of the 21st of November, 1890, and the arrangement under which *Dowse* obtained the assent of *Jones* and the other Respondents to become directors and subscribe for 100 shares each. But Mr. *Barker* was aware, in my opinion, of the transfer by *Dowse* on the 16th of December, 1890, of 250 ordinary shares to each of the Respondents. The Respondents and Mr. *Dowse* each of them took up and paid for 100 £1 shares in the company. Except these shares, and the one share each agreed to be taken by the subscribers of the memorandum of association, no shares were taken up by any one, and the only other person that became a shareholder was Mr. *Boeken*, who, in June, 1891, became transferee of Mr. *Dowse's* shares. I think Mr. *Boeken* was aware of all the relations and arrangements between Mr. *Dowse* and the Respondents, including the letter of the 21st of November, 1890. A prospectus was issued by the directors, which after stating the capital to be £5100, allotted into 5000 ordinary shares and 100 founders' shares, contains the following statement: "3245 £1 ordinary shares, are now offered for subscription, the directors and others having already subscribed for the remainder of the shares." The company continued to carry on business on a small scale until the spring of 1891, and, it being then desired to raise more capital, a new prospectus was, in June, 1891, issued to the public, inviting further subscriptions. Neither this prospectus nor the prospectus first issued contained any mention of the transfer by the vendor of shares to the directors or of the agreement to pay cash, and I find as a fact that it was the intention of the Respondents to conceal from the public invited to take shares the fact of such transfer and agreement. I do not think that there was any intention to conceal the arrangement between Mr. *Dowse* and the Respondents from the subscribers of the memorandum of association, and I find generally that the subscribers were aware that the Respondents were to share profits with the vendor. The creditors of the company are few besides the Respondents, the principal creditor being Mr. *Barker* for services rendered to the company as an accountant.

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The first question which I have to decide is whether the Respondents are accountable to the company for the shares which they received from the vendor.

First, then, as to the founders' shares. As to these, I do not think that the Respondents are liable, because, with regard to these, there was no concealment, the agreement with the company disclosing the fact that such founders' shares would be allotted to the Respondents, and the 10th clause of the agreement disclosing the fact that the Respondents became directors at the request of the vendor, and that the board of directors would consequently not be independent.

With regard to the ordinary shares, the case is different, because, undoubtedly, with regard to these, there was concealment from the public to whom the prospectus was issued, although the public did not take up any shares.

Now, it is contended that the Respondents are not accountable to the company for these shares on the following grounds: First, because there was no concealment from the actual members of the company; and it is said that it was intended to work the company as a private company. I find, however, as a fact, having regard to the issue of the first prospectus, that the intention was to get the public to subscribe. Secondly, it is said that the shares were not a gift to the Respondents, but transferred to them in consideration of their subscribing for 100 shares each. Lastly, it is said that, even if the Respondents are liable, they are only responsible for the highest value of the shares since they received them, and that the shares have never had any value.

I will deal with these contentions *seriatim*.

The first contention, in my opinion, fails. The issue of the prospectus shews an intention to deceive future allottees. The fact of the knowledge of the actual members of the company will not in such case avail directors. This is clear from the judgment in *In re British Seamless Paper Box Company* (1). I do not think that the case is materially differenced by the fact that the Respondents did disclose to the company that they were receiving some consideration or gifts from the vendor. The fact of the

(1) 17 Ch. D. 467.

mention of the transfers in the minute-book is not a sufficient disclosure. The transfers might, in fact, have been for valuable consideration, notwithstanding they are expressed to be for 15s.

The second point also, in my opinion, fails. Even assuming that the inducement to the vendor was the undertaking of the Respondents to take up shares, I think in substance the shares were given to the Respondents in consideration of their becoming directors, and at a time when there were still matters open between the company and *Dowse*.

Lastly, I think that the contention that the shares were of no value fails. The Respondents themselves paid full value for the shares. This raises a presumption of value as against them.

Nov. 11. An appeal was entered, but, the Appellants not appearing, it was dismissed.

Solicitors: *Savidge & Southern; Long & Gardiner*, agents for *F. H. Anderson, York; Fox & Joy.*

F. E.

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[0137 of 1892.]

Company—Winding-up—Director—Misfeasance or Breach of Trust—Exercise of Judgment or Discretion—Form of Summons—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

A summons, under sect. 10 of the *Companies (Winding-up) Act*, 1890, against directors, for misfeasance or breach of trust in relation to the company, should state the grounds on which it is suggested that the matters complained of constitute a wrongful act or misfeasance for which the directors are responsible.

Where the alleged misfeasance consists of an act which is not *ultra vires* the company, and not fraudulent or dishonest, the directors are not liable unless it can be shewn that they did not really exercise their discretion and judgment as such directors, and that the omission to do so resulted in loss or damage to the company.

Directors of a company having power to lend money and to promote other companies passed a resolution that a cheque for £250 should be drawn in favour of *G.*, for a loan to him of that amount, on certain security. The cheque was drawn and handed to the solicitor of the company, who gave it to *G.* without obtaining the security.

The directors passed a second resolution that a cheque for £1000 should

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be drawn in favour of *G.* for a loan to him of that amount on security of (*inter alia*) a contract, the date of which and the names of the parties to which were left in blank in the resolution. This cheque was also drawn and handed to the solicitor of the company, who gave it to *G.* without obtaining the security. The directors knew the nature of the contract, and that it related to a company which *G.* was bringing out, and the existence of which the directors believed to be for the benefit of their own company, and they advanced the £1000 to assist *G.* in bringing out the new company.

The company which had lent the money recovered judgment against *G.* for the amount of the loans, but never realized anything under it, and *G.* became insolvent:—

Held, that the directors, having exercised judgment and discretion, were not liable for misfeasance or breach of trust in relation to the company.

A SUMMONS was taken out by the liquidator in the voluntary winding up of the *New Mashonaland Exploration Company, Limited*, directing Sir *J. W. Campbell*, Bart., *William Adams*, the Earl of *Mayo*, *Frank Buchanan*, and Colonel *H. J. Willett*, who were the directors of the company, to attend on the hearing of an application by the liquidator that it might "be declared that all persons, being directors of the company, who in any manner authorized, sanctioned, or participated in the payment to Mr. *A. M. Green* of the sum of £250 of the company's moneys, on or about the 5th day of August, 1891, and in payment to Mr. *A. M. Green* of the sum of £1000 of the company's money, on or about the 26th day of August, 1891, are jointly and severally liable to repay to the said voluntary liquidator of the said company the amounts so paid, with interest at the rate of £5 per cent. per annum, and for an order that the following inquiry be made: What persons were directors of the said company at the time the said payments were made, and which of them in any way authorized, or sanctioned, or participated in the making of such payments?"

The company was incorporated in May, 1891, one of its objects, as stated in its memorandum of association, being "to negotiate loans for the company, or other persons or bodies, to lend moneys, securities, and other properties, to discount bills, and deal in all kinds of securities and negotiable instruments, to become sureties and guarantors for any purposes, and generally to carry on the business of capitalists, financiers, bankers,

merchants, and money-dealers," and another of such objects being "to promote and form, and assist in promoting and forming, any company . . . and to subsidize or otherwise assist any other company, and to pay and contribute, either in cash or shares, to the expense of promoting or establishing any company or association."

At a meeting of directors, held on the 5th of August, 1891, it was resolved as follows: "Mr. *A. M. Green* having requested an advance of £250 against his promissory note at one month's date and a deposit of 1000 ordinary shares of this company, paid up, that his request be granted, and that a cheque be and is hereby drawn in his favour for £250, such loan to bear interest at the rate of 10 per cent. per annum."

At the same meeting the cheque of the company for £250 was drawn and signed by the directors present, and handed by them to the company's solicitor.

The cheque was handed by the solicitor to, and cashed by *Green*, who, on the 6th of August, 1891, gave the company his promissory note in accordance with the resolution.

Green, however, never deposited any of the shares mentioned in the resolution.

At a subsequent meeting of directors, held on the 26th of August, 1891, the following minute was entered in the minute-book:—

"Mr. *Green* having made an application for an advance of £2000 for twenty-one days, upon the security of a contract made between ——— of the one part and ——— of the other part, whereby he is entitled to certain moneys, and offered for such advance a bonus of £300, the matter was discussed, and it was resolved that £1000 be advanced to Mr. *Green* upon a first charge upon the contract, and also the deposit of 2000 ordinary shares of this company, and bonus of £150 to be also included in the charges."

The company's cheque for £1000 was also filled up and signed by the directors present, or some of them, and handed to the solicitor of the company, who afterwards handed it to *Green*. *Green* cashed this cheque also, but never gave the security mentioned in the resolution.

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No part of either sum advanced to *Green* was ever repaid by him, and, although the company recovered judgment against him for the money lent, nothing was ever obtained in payment or satisfaction under such judgment.

In March, 1892, a receiving order was made against *Green*, and there was evidence that his creditors were not likely to receive any dividend from his estate.

The company afterwards went into voluntary liquidation, which was, on the 30th of April, 1892, ordered to be continued under the supervision of the Court; and the above-mentioned summons was issued on the 27th of May, 1892. There was evidence that *Green*, when he obtained the second advance, was engaged in bringing out a new company called the *Pioneers of Mashonaland Syndicate, Limited;* that the directors knew the nature of the contract he had entered into in connection with that company, which contract was the one referred to in the resolution of the 26th of August, 1891; that the directors believed that the bringing out of such new company would be beneficial to their own company; and that they advanced the £1000 to *Green* to assist him in bringing out such new company.

Evidence was also filed, on behalf of the directors concerned in the two advances, that the cheques were given to the solicitor of the company with instructions to hand them to *Green* on his giving the securities mentioned in the resolutions.

The summons was heard on the 23rd and 25th of July, 1892, before Mr. Justice *Vaughan Williams*, who, on hearing the evidence, held that no case had been made against the Earl of *Mayo* or Colonel *Willett*.

Cozens-Hardy, Q.C., and *Shearman*, in support of the summons:—

The application is for payment by the directors of sums improperly paid by them out of the assets of the company. It is made under sect. 10 of the *Companies (Winding-up) Act*, 1890; but that section is in substance a re-enactment of sect. 165 of the *Companies Act*, 1862, now repealed, and the decisions under which are applicable to sect. 10 of the Act of 1890. The directors have been guilty of "a breach of trust in relation to the company."

[VAUGHAN WILLIAMS, J.:—There are two questions to be answered: (1.) Was what was done within the powers of the directors? (2.) If it was within their powers, did they so conduct the transaction as to make it an honest exercise of their powers?]

The question is rather whether the powers were exercised negligently.

[VAUGHAN WILLIAMS, J.:—Mere honesty will not avail them; mere negligence will not charge them.]

It is sufficient if they are shewn to be guilty of such negligence as would make an ordinary trustee liable.

A. Rowden, for the Earl of *Mayo*, and *H. Terrell*, for Colonel *Willett*, read the evidence filed on behalf of their respective clients, and were not further called on.

J. Bradford, for *Buchanan*:—

At the most, the directors have only shewn imprudence in the exercise of the powers conferred on them, and even then they are not to be made liable unless gross negligence is distinctly charged and clearly proved: *Overend & Gurney Company* v. *Gibb* (1); *Bentinck* v. *Fenn* (2).

On the summons and evidence in this case no Court could fix the directors with fraud or misfeasance. The loss was occasioned through the solicitor handing over the cheques without obtaining the securities required by the resolutions; but the directors are not liable for loss arising from his negligence. He is not their agent, but the agent of the company. The duties of directors are different from those of trustees, and because they have signed a cheque they are not liable in case it is misapplied by a person in whose hands it is placed in the ordinary course of business.

Eve, for Sir *J. W. Campbell*:—

The arguments on behalf of *Buchanan* apply in favour of the other directors. The only question is whether, after they have taken part in an *intrà vires* transaction, the directors are to be

(1) Law Rep 5 H. L. 480. (2) 12 App. Cas. 652, 662.

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liable for any loss which occurs through the incidental act of a third person employed by the company. The solicitor was guilty of negligence as solicitor of the company, and may be proceeded against under the Act of 1890. All the directors did was to allow him to receive the cheques. Even if the directors were trustees, that would not render them liable, as for a breach of trust, in case the money was misapplied. Directors cannot be expected to run about the City and see that the moneys of the company are actually paid.

Swinfen Eady, for *Adams*:—

The directors were justified in relying on the advice of the company's solicitor. So far as what was done was within their province, they exercised their best judgment on it. Compliance with one of two conditions is essential to the success of such an application as this. Either the transaction must be *ultrà vires*, or it must be something done, not honestly, but with a sinister motive, and accompanied with advantage to the person doing it. It is putting the Applicant's case too high to say that a director is liable unless he acts like the prudent man of business so often mentioned in the text-books, but not met with in actual life.

[VAUGHAN WILLIAMS, J.:—I agree there. But it is not necessary that he shall have been very negligent; it is enough if he is shewn not to have exercised his judgment as a director worthy of the name.]

These directors were the officers of a speculative exploration company. If the advances had been made to some person who was not connected with the primary object of the company, the transaction would have required careful scrutiny; but *Green* was a person floating a company which the directors, in the interest of their own company, wished to see floated, and to assist him in doing so was the object of making the second advance. It was a mercantile adventure involving risk, and not a mere trustees' investment. The difference between a director and a trustee has been pointed out by Mr. Justice *Kay*, who says, "that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which

would be exceedingly disadvantageous to the companies they represent": *In re Faure Electric Accumulator Company* (1).

The same Judge refers to Lord *Hatherley's* intimation in *Overend & Gurney Company* v. *Gibb* (2), that to render them liable their conduct must amount to *crassa negligentia.*

[VAUGHAN WILLIAMS, J.:—*Crassa negligentia* is a term to be got rid of. Lord *Esher* seems to have thought that, and says something different: *Marzetti's Case* (3)].

The transaction must be looked at with the surrounding circumstances of the time—not by the light of subsequent events.

Cozens-Hardy, in reply:—

It is not alleged that what was done was *ultra vires*, or fraudulent, or dishonest, but that the directors were guilty of such negligence in the discharge of their duty as renders them liable for misfeasance or breach of trust. They are liable under the section, because they have been guilty of such negligence as would make them liable in point of law: *Marzetti's Case.* To escape liability they must have *bonâ fide* exercised their judgment and discretion; but they cannot be said to do that when they lend moneys on security and pay it over without security, or when they advance money on a contract of the terms of which, and even of the names of the parties to, and the date of which, they are ignorant. They would have been liable as agents of a firm, and they are liable as directors of a company.

VAUGHAN WILLIAMS, J.:—

For reasons I have given, and which I will not repeat, I do not think the application can succeed as against the Earl of *Mayo* or Colonel *Willett.*

Before I deal with the case as it affects the other directors, I wish to say a word or two as to the form of the summons, though I am not going to decide the case on the form of the summons. [His Lordship read the summons, and continued:—] It does not seem to me that that form of summons is correct, and it is certainly not in accordance with the form given in Mr. *Palmer's*

(1) 40 Ch. D. 141, 151. (2) Law Rep. 5 H. L. 487.
(3) 28 W. R. 541, 542, 543.

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Company Precedents (1). I find there given this form: "That it may be declared that *A.* is liable to contribute to the assets of the company the sum of £——, as compensation for his misfeasance in accepting, whilst a director of the company, certain bonus shares from *A. B.*, the vendor to the company." And then the summons goes on to ask for an order for payment of the amount and of the costs. And in Mr. Registrar *Emden's* Winding-up Practice (2) the following form is given: "That it may be declared that *A. B.*, *C. D.*, and *E. F.*, directors [*or as the case may be*] of the above-named company, were guilty of misfeasance and breach of trust in relation to the above-named company, inasmuch as [*set out concisely the acts of misfeasance*], and that they are jointly and severally liable to the said company and to *G. H.* as the liquidator thereof, to the extent of £——, together with interest thereon from the date of such misfeasance and breach of trust, and also are so liable to make good any loss which the said company may have sustained by reason of such misfeasance or breach of trust." And the summons proceeds to claim payment of costs, or such other order as the case may require. It does not seem to me that the summons in the case before me sufficiently defines the grounds upon which the liquidator says the directors ought to be ordered to pay the money claimed. It does not go on to say on what grounds it is suggested that the payments made by the directors were wrongful, or acts of misfeasance for which the directors are responsible.

It may, perhaps, be contended that it is not correct to state the grounds in a summons like this. I should have thought that the summons might have been so framed as to give some sort of information as to how the payments were said to be tainted. But, at any rate, such information might have been given in the affidavit in support of the summons; yet no one reading the affidavit can tell whether the liquidator meant to say the directors were guilty of fraud, or what was the nature of the misfeasance he meant to charge against them. For the sake of the future practice, I point out that the summons, even with the affidavit, leaves one too much in the dark as to what is charged against the directors.

(1) 5th Ed. p. 847, Form 758. (2) 4th Ed. p. 708, Form 253.

I know now from Mr. *Cozens-Hardy* what the liquidator does charge them with. He does not say that what they have done is *ultrà vires* the company, or that they have been guilty of fraud. He does not say that the directors were guilty of dishonesty, if there is any sound distinction between that and fraud. What he does say is, that these directors were guilty of negligence of such a character as to be within the scope of the section. To ascertain whether that is so, one must first look at the section, and see what cases come within it, and whether this is one of them.

The section is not now sect. 165 of the *Companies Act*, 1862, but sect. 10 of the *Companies (Winding-up) Act*, 1890, which provides that where, in the course of a winding-up, any promoter, "director, manager, liquidator, or other officer of the company, has misapplied, or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company," the Court may examine into his conduct and compel him "to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable," together with interest, or to contribute such sums to the assets of the company by way of compensation as the Court thinks just.

Now, as I understand Mr. *Cozens-Hardy*, he does not say that what the directors have done is within any of these words except "misfeasance or breach of trust." It has been said that you cannot bring directors within the section unless they have been guilty of a misfeasance in the nature of a breach of trust; but, be that as it may, it is plain that if directors are guilty of such negligence that it cannot be said that in doing what they did they attempted to perform their duty as directors, then such directors are guilty of misfeasance. To use Mr. *Cozens-Hardy's* words, if the directors did not *bonâ fide* exercise their discretion and judgment as agents of the company, that is misfeasance within the meaning of the section. I shall adopt that construction with the exception of the words *bonâ fide*, and hold that, in order to make the directors liable, you must be able to deny that they did really exercise their judgment and discretion in this way.

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It is important to inquire what is complained of in this case, because, whatever may be the definition of misfeasance, the directors cannot be made liable unless some damage has resulted from what is complained of. If an earlier act, not illegal in itself, caused the damage or lost the money, you cannot make a director liable merely because he has committed later acts of misfeasance which have occasioned no loss; though it is true that, when you are ascertaining the nature of previous conduct, you may inquire into later conduct to explain what has been previously done. It seems to me that the acts of the directors which resulted in damage to the company were the passing of the resolutions of the 5th and 26th of August, 1891. [His Lordship read the resolution of the 5th of August, 1891, and continued:—] Having regard to the very wide terms of the memorandum of association, it is impossible to say that the mere passing of this resolution was of itself an act of misfeasance. It was plainly within the powers of the directors to make such an advance to *Green*, if it was for purposes within those wide terms and they exercised their judgment. But it is said there was misfeasance because the resolution was immediately acted on by drawing a cheque for £250 and handing it over to the solicitor for the purpose of its being at once passed on to *Green*. If I had arrived at the conclusion that that was done, I should have said that the director who advanced money on a security, without waiting for the security, could not have used any discretion or judgment at all. For to advance money on security without waiting for the security is so unbusinesslike an act that it cannot be called a mere error of judgment or imprudent act. If I apply the test in *Marzetti's Case* (1), whether the person so acting would be under liability in a Common Law action, it is quite plain that an agent so acting would incur a liability at Common Law.

But I do not think the affidavits make out that the directors did act in that way. I do not think they did direct the solicitors to hand over the cheque without getting the deposit of ordinary shares. I have had doubts about this, because there is a good deal in their subsequent conduct to make one believe that they never did expect that the security would be given before the cheque

(1) 28 W. R. 541.

was handed over. The absence for a long time of any complaint, although the directors knew the shares had not been deposited, goes a long way to shew that the directors did not mean that the cheque should be withheld in the meantime; and, if the directors intended that the cheque should be handed over without waiting for the deposit, they would be liable as not having exercised their discretion and judgment. But I have come to a decision in their favour on this point, and hold they are not liable.

As to the transaction of the 26th of August, 1891, it is, in one sense, more in favour of the directors having exercised their judgment. When one looks at the affidavits, one cannot doubt that the transaction was entered into with intent to advance the interests of the company. It was made with the particular object of helping *Green* to bring out a second company, the existence of which would be for the benefit of this company. But there were matters which were not in the interest of the company. It has been pointed out that the resolution of the 26th of August, 1891, contained blanks, and it has been said that that shews the directors did not even know the names of the parties to the contract. I do not myself attach great importance to that, for the affidavits shew they knew the nature of the contract. The names of the parties to it were matters of detail as to which they were at liberty to look to their solicitor, and matters as to which they would have to some extent to depend on his advice. Here, again, it is impossible to deny that there is a good deal in the subsequent conduct of the directors which makes one doubt whether they exercised their judgment.

But, on the whole, the liquidator has not satisfied me that there was no real exercise of discretion and judgment, and, if that was so, the matters being *intrà vires*, the application fails, and must be dismissed—as to the Earl of *Mayo* and Colonel *Willett*, with costs, and as to the other directors, without costs.

Solicitors: *W. H. Smith & Son; Garnett & Harrison; Vallance & Co.; J. H. Gibson; H. Stanley-Jones.*

F. E

END OF VOL. III.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1892, will be as follows:—

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[1892] 1 Ch. [1892] 2 Ch. [1892] 3 Ch.

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2. —— *Memorandum of Association—Reconstruction—Sale of Assets to New Company—Shares in Purchasing Company—Voluntary Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.] It is competent for a company by its memorandum of association to exclude the operation of the 161st section of the Companies Act, 1862, in the event of a sale by the company of its undertakings to another company, the whole or part of the consideration for such sale being

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shares in the purchasing company, notwithstanding that at the time of the execution of the contract for sale it is in contemplation to wind up the selling company voluntarily. COTTON *v.* IMPERIAL AND FOREIGN AGENCY AND INVESTMENT CORPORATION - - - - 454

3. —— *Memorandum of Association—Registration—Subscription by Infants—Certificate of Incorporation—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18.] The contract of an infant being not void, but only voidable, his signature to the memorandum of association of a company is the signature of a "person" within the meaning of sect. 6 of the Companies Act, 1862 (which requires such a memorandum to be signed by seven or more persons); and, on the certificate of incorporation being obtained, the company is validly incorporated, and subsequent avoidance of the infant's contract does not invalidate the registration of the company or any intermediate acts affecting the rights of third persons. The certificate of incorporation is not conclusive to prevent the objection that the memorandum was not signed by seven persons.—*In re Nassau Phosphate Company* (2 Ch. D. 610) followed.—*In re National Debenture and Assets Corporation* ([1891] 2 Ch. 505) distinguished. *In re* LAXON & CO. (2). [555

4. —— *Misrepresentation in Prospectus—Prospectus issued and Shares applied for before the formation of the Company—Laches—Return of Allotment Money—Interest.*] B. signed a printed form issued by the promoters of an intended company, expressing his willingness to become a member of the council of administration of the intended company. M. also wrote to the promoters promising to help the company. Soon afterwards the promoters issued a prospectus in which the company was described as "to be incorporated under the Companies Acts," and an extract was given from the proposed articles of association to the effect that there would be a council of administration of members of the company, and a list of members of the council was appended containing the names of B. and M.—In reliance on this prospectus, K. applied for shares in the intended company. On the 31st of January, three days after K.'s application, the company was duly registered under the Companies Acts; and on the 2nd of February, the directors allotted K. the shares which he had applied for, and approved a form of prospectus substantially the same as that which had been issued by the promoters. On the 11th of February, K. paid the allotment money on those shares. On the 26th of June, K. discovered that B. and M. had both declined to take shares in the company and to become members of the council of administration, and took out a summons to have his name removed from the list of shareholders:—*Held* (reversing the decision of Kekewich, J.), that the effect of the statement in the prospectus was not merely that B. and M. had expressed their willingness to become members of the council of administration, but that they had authorized the publication of their names as members, and as such was a false statement of fact; that the prospectus, although issued by the promoters

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before the formation of the company, was the basis of the contract between the company and K. for the allotment of shares; that the misstatement in the prospectus was relied on by K., and was material to the contract, and consequently that K. was entitled to rescind the contract and repudiate the shares. And the Court, being of opinion that there had been no laches or acquiescence, ordered K.'s name to be removed from the list of shareholders, and the money paid by him on application and allotment to be returned with interest at 4 per cent.—*Wainwright's Case* (62 L. T. (N.S.) 30; 63 L. T. (N.S.) 429) considered. *In re* METROPOLITAN COAL CONSUMERS' ASSOCIATION. KARBERG'S CASE - - - - **C. A. 1**

5. —— *Life Assurance Company—Power of Company to Purchase its own Shares—Policy-holders—Reduction of Security—Extinguishment of Shares—Winding-up.*] Directors of a life insurance company were authorized, by special Act of Parliament, to purchase, in the name of the company or otherwise, the company's own shares; pursuant to this power 8781 £10 shares, with £2 10*s.* paid-up, were purchased in the names of trustees for the company, and subsequently transferred into the name of the company. In 1889 the company was ordered to be wound up compulsorily, and the liquidator sought, on behalf of the policy-holders, to make a call upon the shareholders to the extent of the amount unpaid on the purchased shares:—*Held*, affirming the decision of Chitty, J., that the effect of the purchase by the company of these shares, whether in the names of trustees or of the company, was necessarily to extinguish the shares; that the policy-holders had no charge on the uncalled capital of the company, but were unsecured creditors payable out of the existing assets of the company only; and that the liquidator's application failed, and must be dismissed. *In re* SOVEREIGN LIFE ASSURANCE COMPANY **C. A. 279**

6. —— *Reduction of Capital—Partial Reduction—One Class of Shares—Shareholder—Voting Power—Articles of Association, alteration of—"And reduced"—Companies Acts*, 1867 *and* 1877.] The Court has power, under the Companies Acts, 1867 and 1877, to sanction a resolution by a limited company for a partial reduction of one class of its shares, as for instance, a reduction of original shares already issued and fully paid up, leaving the unissued shares unreduced; but, if the company's articles of association confer on each shareholder a voting power proportionate to his holding of original shares, the Court will, before sanctioning the reduction, require that the company shall alter its articles so as to make the voting power proportionate to the reduced capital. The Court will not, on the hearing of a petition by a limited company for reduction of capital, at once dispense with the addition of the words "and reduced" to the company's name; that addition being requisite to give, for such a period as the Court thinks reasonable, a warning to the public of the financial position of the company. *In re* PINKNEY & SONS STEAMSHIP COMPANY **125**

7. —— *Reduction of Capital—Partial Reduction—One Class of Shares—Companies Acts*, 1867 & 1877.] The Court has power under the Companies Acts, 1867 & 1877, to sanction a resolution of a limited company for the reduction of part only of one class of shares, leaving the rest unredeemed. *In re* NEWBERY-VAUTIN (PATENTS) GOLD EXTRACTION COMPANY - - **127, n.**

8. —— *Shares—Mortgagor and Mortgagee—Payment of Mortgage Debt—Right of Mortgagor to require Transfer of Security to his Nominee in lieu of Reconveyance—Lien on Shares for Debt due from Shareholder—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 2, 15.] The articles of association of a company provided that the company should have a first and paramount lien upon the shares of each member for his debts to the company, and that, for the purpose of enforcing the lien, the directors might, on default in payment of a debt, sell the shares, and execute a transfer of the shares sold to the purchaser:—*Held*, that this lien constituted a "charge" upon the shares, within the meaning of sect. 2, sub-sect. vi. of the Conveyancing and Law of Property Act, 1881, for a debt due from the shareholder to the company, and that, consequently, sect. 15 applied, and entitled the shareholder to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee.—The shareholder undertaking, on four days' notice by the company, to pay to them the sum due from him, upon their transferring their lien to his nominee, an injunction was granted restraining the company, until the trial of the action or further order, from selling or transferring the shares. EVERITT *v.* AUTOMATIC WEIGHING MACHINE COMPANY - - **506**

9. —— *Winding-up—Directors—Misfeasance—Concealed Gifts from Vendor—Measure of Damages—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] The vendor of patents, to purchase and work which a company (registered without articles) was formed, agreed with A., B., C., and D. that, if they would become directors and subscribe for 100 £1 shares he would give each of them one-fifth of his profits under his agreement with the company.—One of the objects of the company, as stated in its memorandum of association, was to carry into effect its agreement with the vendor, with or without modification.—The subscribers to the memorandum of association then appointed A., B., C., and D. directors, and approved the company's agreement with the vendor, so modified as to provide for the issue to A., B., C., and D. of eighty out of the 100 fully paid-up founders' shares, which formed part of the consideration payable by the company to the vendor, and that the agreement should not be impeached on the ground that the vendor stood in a fiduciary relation to the company, or that the directors, having accepted office at his request, did not constitute an independent board.—The modified agreement was filed under sect. 25 of the Companies Act, 1867, and the eighty founders' shares were then allotted to A., B., C., and D.—The vendor then transferred to A., B., C., and D. four-fifths of the ordinary shares, forming part of the consideration payable by the company to the vendor, and A., B., C., and D., each took and paid for 100 shares.—Except the shares allotted to the vendor and A., B., C.,

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and D., under the modified agreement, the shares subscribed for by and transferred to A., B., C., and D., and the seven shares subscribed for by the signatories to the memorandum of association, no shares were ever issued.—All the shareholders, and X., who subsequently became transferee of the vendor's remaining shares, knew of the above transactions.—A prospectus subsequently issued to the public, inviting subscriptions for shares, omitted to mention the transfer of vendor's shares to A., B., C., and D.—The company afterwards went into voluntary liquidation, and the liquidator sought to have A., B., C., and D. declared guilty of misfeasance, and ordered to repay the par value of all vendor's shares received by them, although such shares were then worthless:—*Held*, (1) that A., B., C., and D. were not liable in respect of the founder's shares; (2) that they were liable in respect of the vendor's ordinary shares received by them, because with regard to them there had been concealment from the public to whom the prospectus was issued; and (3) that such ordinary shares must be paid for at their nominal value. *In re* POSTAGE STAMP AUTOMATIC DELIVERY COMPANY - - - 566

10. —— *Winding-up—Director—Misfeasance or Breach of Trust—Exercise of Judgment or Discretion—Form of Summons—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] A summons, under sect. 10 of the Companies (Winding-up) Act, 1890, against directors, for misfeasance or breach of trust in relation to the company, should state the grounds on which it is suggested that the matters complained of constitute a wrongful act or misfeasance for which the directors are responsible.—Where the alleged misfeasance consists of an act which is not ultra vires the company, and not fraudulent or dishonest, the directors are not liable unless it can be shewn that they did not really exercise their discretion and judgment as such directors, and that the omission to do so resulted in loss or damage to the company.—Directors of a company having power to lend money and to promote other companies passed a resolution that a cheque for £250 should be drawn in favour of G., for a loan to him of that amount, on certain security. The cheque was drawn and handed to the solicitor of the company, who gave it to G. without obtaining the security.—The directors passed a second resolution that a cheque for £1000 should be drawn in favour of G. for a loan to him of that amount on security of (inter alia) a contract, the date of which and the names of the parties to which were left in blank in the resolution. This cheque was also drawn and handed to the solicitor of the company, who gave it to G. without obtaining the security. The directors knew the nature of the contract, and that it related to a company which G. was bringing out, and the existence of which the directors believed to be for the benefit of their own company, and they advanced the £1000 to assist G. in bringing out the new company.—The company which had lent the money recovered judgment against G. for the amount of the loans, but never realized anything under it, and G. became insolvent:—*Held*, that the directors, having exercised judgment and discretion, were not liable for misfeasance or breach of trust in relation to the company. *In re* NEW MASHONALAND EXPLORATION COMPANY - - - 577

11. —— *Winding-up—Order—Right of Creditor to Compulsory Order—Probability of Advantage to Creditors from Investigation into Company's Affairs—Companies Act*, 1862 (25 & 26 *Vict. c.* 89, *ss.* 79, 91—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.] Apart from the Companies (Winding-up) Act, 1890, an unpaid creditor is, on satisfying certain conditions precedent, primâ facie entitled to a compulsory winding-up order; though such order will not be made when those who oppose it shew that no possible benefit can accrue from it to the petitioning creditor.—But, since the coming into operation of the Companies (Winding-up) Act, 1890, the onus does not lie on the petitioning creditor to shew on affidavit that there will be assets available for the unsecured creditors if a compulsory order is made. To justify the making of such an order it is sufficient to shew that an investigation under the Act into the affairs of the company is likely to turn out to the advantage of the unsecured creditors. *In re* KRASNAPOLSKY RESTAURANT AND WINTER GARDEN COMPANY 174

12. —— *Winding-up—Petition for Compulsory Order—Application at Hearing for Supervision Order—Fresh Advertisement—Desirability of Compulsory Order.*] Petitions were presented by an insolvent company and by one of its creditors, asking that the company might be ordered to be wound up by the Court. Before the petitions were heard an extraordinary resolution was passed for a voluntary winding-up, and at the hearing the Petitioners, who were supported by a large majority of the creditors and shareholders, asked that the voluntary winding-up might be continued under the supervision of the Court:—*Held*, that the hearing must be adjourned in order that fresh advertisements might be issued stating that only a supervision order was about to be asked for.—On the petition again coming on for hearing a supervision order was reluctantly granted, the advantages of a compulsory order being pointed out by the Court. *In re* NEW ORIENTAL BANK CORPORATION - - - - - 563

13. —— *Winding-up—Public Examination—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Companies (Winding-up) Rules*, 1890, *r.* 71.] The Court has no jurisdiction to direct a person to be publicly examined under sect. 8, sub-sect. 3, of the Companies (Winding-up) Act, 1890, unless the Official Receiver has made a report, stating that, in his opinion, a fraud has been committed in the promotion or formation of the company, or by a director or other officer of the company since its formation; and that the person whom it is proposed to examine has taken part in the promotion or formation of the company, or has been a director or officer of the company.—The expression "such report" in sect. 8, sub-sect. 3, means a further report under sub-sect. 2, not a preliminary report under sub-sect. 1.—*Semble*, that an application to have a person publicly examined under the above sub-section may be made ex parte.—Decision of Vaughan

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14. —— *Winding-up—Public Examination of Promoters or Officers—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Companies (Winding-up) Rules*, 1890, *r.* 71.] An order for public examination under the Companies (Winding-up) Act, 1890, s. 8, sub-s. 3, may be made if the Official Receiver has made a further report under sub-sect. 2, shewing, though not necessarily stating in express terms, his opinion that fraud has been committed by some person in the promotion or formation of the company, or by some director or officer in relation to the company since its formation; and that the person whom it is proposed to examine has taken part in the promotion or formation of the company, or has been a director or officer of the company, and it is not necessary that the report should allege him to have been a party to the fraud.—Such order may be made ex parte, leaving the party to move to discharge it if he alleges it to have been made without jurisdiction.—*Ex parte Barnard* ([1892] 3 Ch. 307) explained. *In re* TRUST AND INVESTMENT CORPORATION OF SOUTH AFRICA. *In re* BERTRAM LUIPAARD'S VLEI GOLD MINING COMPANY - - - - C. A. 332

15. —— *Winding-up—Transfer of Proceedings from County Court to High Court—Transfer before Winding-up Order—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 3.] A company was registered as a limited company; but two of the subscribers of the memorandum of association were infants. A petition by creditors was presented for winding it up as an unregistered company; or in the alternative, as a limited company. The capital being under £10,000, the petition was presented in the County Court; but before it came on for hearing Vaughan Williams, J., made an order for transferring it to the High Court:—*Held*, on appeal, that the power given by the Companies (Winding-up) Act, 1890, to transfer "the winding-up of a company, or any proceedings therein," extended to a petition on which no order had been made; that the Judge, therefore, had jurisdiction to order a transfer; and that, having regard to the importance of having a valid winding-up order, and to the nature of the question as to the status of the company, good cause was shewn for making the order. *In re* LAXON & CO. - - C. A. 31

16. —— *Winding-up—Voluntary Winding-up—Surplus Assets—Distribution among Shareholders—Shares of Unequal Amounts—Capital partly paid up—Capital paid in advance—Interest—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 109, 133, *sub-ss.* 1, 10.] The original capital of a company consisted of £150,000 in £1 shares, of which only 30,000 were issued; but these were fully paid up as required by the articles of association.—By special resolutions the capital of £150,000 was afterwards divided into 30,000 shares of £1 each, and 24,000 shares of £5 each; the sum of 10s. per £5 share was payable on application, and a further sum of 10s. within three months of allotment; but the directors might receive from any £5 shareholder willing to advance the same all or any part of the moneys due on such shares beyond the sums actually called for, and on these advanced moneys interest was payable to the shareholder.—In a voluntary winding-up there was, after payment of all liabilities of the company and the costs of the liquidation, a surplus in the hands of the liquidator which shewed a deficit on the total amount of called-up capital including the sums paid in advance by £5 shareholders:—*Held*, that the surplus must be distributed as follows: (1.) in repayment to the £5 shareholders who had made advances beyond £1 per share of such advances with interest, not only till the winding-up, but down to the time of repayment; (2.) in payment to the £1 shareholders of 16s. per share, so as to put them in the position of shareholders who, like the £5 shareholders, had only paid 20 per cent. on the amount of their shares; (3.) in payment to the £5 and £1 shareholders, pro ratâ, treating each £5 shareholder as if, in respect of each of his £5 shares, he were the owner of five £1 shares. *In re* WAKEFIELD ROLLING STOCK COMPANY - 165

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2. —— *Drama—Foreign Play—Right of Representation—Expiration of Right—Infringement—Registered Owners—Tenancy in Common—Right of one or more of Registered Owners to maintain Action—"Translation"—International Copyright Act*, 1852 (15 & 16 *Vict. c.* 12), *ss.* 3, 4—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Retrospective Operation of Statute.*] The International Copyright Act, 1886, cannot be construed so as to revive or recreate a right which had expired before the passing of that Act, or so as to confer a new right on the former owner of an expired right without any fresh act done by him.—In March, 1879, the brothers L.

COPYRIGHT—*continued.*

acquired the dramatic copyright in a French play written for them in France by French authors; and in September, 1879, they were registered in Great Britain as the proprietors of the liberty to represent or perform it. H. made for the brothers L. an English translation of the play, and on the 27th of November, 1879, this translation was registered in Great Britain, and H. was registered as the proprietor of the copyright in it. In 1880 another English version of the play was performed in England by the brothers L. In 1886 two of the brothers L. died. In August, 1881, the Plaintiff took an assignment from the three surviving brothers L. of all their rights in the play, and any translation or adaptation thereof; and in February, 1892, he registered himself as the proprietor of all such rights. In an action for an injunction and damages brought by the Plaintiff in February, 1892, immediately after his registration, against the Defendants, who had performed an English version of the play in this country in October, 1891, and were advertising further performances:—*Held*, by the Court of Appeal (affirming the judgment of Kekewich, J.) (1.) that under sect. 4 of the International Copyright Act, 1852, the dramatic copyright acquired by the brothers L. expired in November, 1884, i.e., five years after registration of H.'s translation; (2.) that reading together (as was necessary) sect. 6 of the International Copyright Act, 1886, art. 14 of the Berne Convention, and clause 3 of the Order in Council giving effect to the Convention, there could be no infringement by the Defendants of any copyright in the French play as distinguished from the English translation of it; and (3.) that sect. 6 of the Act of 1886 did not revive or recreate expired copyright or confer any new right on the owner of an expired right without any fresh act done by him; and *held*, accordingly, that the Plaintiff had no right either to an injunction or damages in respect of a translation the copyright in which had expired before the Act came into force.—*Per* Kekewich, J.:—Although the registered owners of a copyright take as tenants in common, and not as joint tenants—*Powell* v. *Head* (12 Ch. D. 686)—yet any one or more of them may maintain an action against a stranger for an infringement of the entire copyright.—*Per* Kekewich, J.:—A "translation" of a foreign play, in order that it may be protected under the law of International Copyright, does not necessarily require to be an absolutely literal translation; it is sufficient if it is substantially a translation. LAURI *v.* RENAD - C. A. 402

3. —— *Newspaper—Custom to Pirate News—Costs.*] The form of expression in which news is conveyed is subject of copyright.—A practice by newspapers to copy from other newspapers is no defence to a copyright action.—Plaintiffs sued to restrain infringement of an important literary newspaper article and three trivial news paragraphs. The Defendants offered an undertaking with costs not to publish again the first article, refusing to undertake as to the others. The Plaintiffs proceeded with the action; they were disallowed costs subsequent to the Defendants' offer. WALTER *v.* STEINKOPFF - - 489

COSTS—Lien for—Assignee - - 543
See SOLICITOR.

COUNTY COURT—Winding-up of company—Transfer to High Court - - 31
See COMPANY. 15.

COVENANT—Lease—Usual covenants - - 41
See LANDLORD AND TENANT.

—— Restraint of trade—Reasonableness [346, 447
See RESTRAINT OF TRADE. 1, 2.

—— Restrictive—Property sold in lots - 148
See VENDOR AND PURCHASER.

CREDITOR—Company—Right to winding-up order - - - - 174
See COMPANY. 11.

DAMAGES—Undertaking as to damages—Measure of damages - - - 159
See PRACTICE. 3.

DEBENTURE—Postponement to subsequent mortgage - - - - 75
See COMPANY. 1.

DIRECTOR—Misfeasance - - 566, 577
See COMPANY. 9, 10.

DIRECTORY—Copyright in headings - 462
See COPYRIGHT. 1.

DISCOVERY—Production of documents—Trade-mark proceedings - - - 201
See PRACTICE. 2.

DISTRIBUTION—Surplus assets of company [165
See COMPANY. 16.

DOMICIL—*Marriage of Scotchman with Englishwoman—Domicil of Origin—Residence—Animus revertendi et manendi—Evidence—Scotch Law—Wife's Property—Jus mariti—Antenuptial Contract.*] The domicil of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom.—The Plaintiff, a son of Scotch parents, his domicil of origin being Scotch, brought an action to establish his title, jure mariti, according to the Scotch law, to one-half of the property of his deceased wife, an English lady, alleging that during the marriage his own domicil, and consequently, his wife's also, was Scotch:—*Held*, upon the evidence, that the Plaintiff had, during the marriage, acquired by choice a domicil in England, and that the domicil so acquired continued until his wife's death.—Judgment of Chitty, J., dismissing the action with costs, affirmed on appeal.—*Per* Chitty, J.: Upon the marriage of a Scotchman with an Englishwoman upon whom property has already been settled, it is desirable that an antenuptial contract should be entered into by them confirming the wife in her rights according to the English law, so as to preclude the husband, in the event of the wife's death, from setting up any claim, jure mariti, to her property under the Scotch law.—Where the domicil of birth is changed during infancy by a change of domicil of the father, *semble*, that the altered domicil cannot be regarded as the infant's domicil of origin. *In re* CRAIGNISH. CRAIGNISH *v.* HEWITT - - C. A. 180

—— Legitimation of children - - 88
See WILL. 1.

DRAMA — Copyright — Foreign play — Translation - - - - 402
See COPYRIGHT. 2.

EASEMENT—Light - - - - 137
See LIGHT.

EXAMINATION — Winding-up of company — Fraud in promotion of company
See COMPANY. 13, 14. [307, 332

—— Lunatic—Inquiry as to lunacy—Right of lunatic to see report - - 194
See LUNATIC. 2.

EXECUTOR — *Administration — Claim against Estate—Statute of Limitations—Right of Residuary Legatee to require Executor to plead Statute —Originating Summons—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 3, 4.] The executors of a will took out an originating summons under rules 3 and 4 of Order LV., asking for the determination, without administration of the estate, whether the first defendant was a creditor upon the estate to any and (if so) what amount. The other defendant was the residuary legatee. The claim of the first defendant was, in fact, barred by the Statute of Limitations, but the executors had not set up the statute, and did not intend (unless so directed by the Court) to set it up; but they desired on other grounds to have the claim investigated by the Court:—*Held*, that the parties must be treated as standing in the same position as if under the old practice an administration decree had been made, and that, consequently, the residuary legatee was entitled to insist on the statute being set up as a defence to the claim. *In re* WENHAM. HUNT *v.* WENHAM [59

FOREIGN DRAMA—Translation of—Copyright
See COPYRIGHT. 2. [402

FOREIGN TRADE-MARK - - - 472
See TRADE-MARK. 1.

FORFEITURE CLAUSE—Will - 209, 481
See WILL. 2, 3.

HARBOURS AND DOCKS—*Dock Company—Statutory Powers—Regulations — By-laws —Confirmation—Ultra vires—Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *ss.* 23, 33, 83, 84, 85—*Practice—Action by Individual—Special Damage—Public Injury — Declaratory Judgment—Consequential Relief — Rules of Supreme Court* 1883, *Order* XXV., *r.* 5.] A dock company having, under its special Act and sect. 83 of the Harbours, Docks, and Piers Act, 1847, power to make regulations and by-laws, issued a compulsory code of regulations for shipowners using the docks; but these regulations were not confirmed as "by-laws" in manner prescribed by sect. 85 of the general Act. Certain accommodation provided for by the regulations, such as the appropriation of particular berths at the option of any shipowner upon certain specified terms, was in excess of what was required by statute to be provided by the dock company, and certain rates and charges imposed by them were beyond the company's statutory powers. A firm of shipowners which, prior to the issue of the regulations, had been in the habit of using the docks

HARBOURS AND DOCKS—*continued.*
and having particular berths appropriated for their ships, finding that the terms imposed by regulations for such accommodation caused them inconvenience and increased expense, brought an action, by themselves as individuals, against the dock company, for a declaration that the regulations were altogether invalid until confirmed as required by statute, and also an injunction by way of consequential relief; a trade protection association of shipowners, of which the firm and other shipowners were members, but which owned no ships themselves, being made co-Plaintiffs. A. L. Smith, J., having, on the trial, dismissed the action with costs, the Plaintiffs appealed. At the hearing of the appeal, the Plaintiffs abandoned their claim for the injunction, and asked for the declaration only:—*Held*, (1.) that the Plaintiff association had no locus standi, not being themselves shipowners, and not being entitled to sue as agents for their members; and (2.) that the Plaintiff firm, suing as individuals, and not by the Attorney-General as representing the public, were bound to prove special damage by the issue of the regulations, and that this they had failed to do, inasmuch as any accommodation provided by the dock company beyond the statutory requirement must be a matter of agreement between the firm and the dock company; but, under Rules of Supreme Court, 1883, Order XXV., rule 5, a declaration was made, notwithstanding the abandonment of the claim for consequential relief, that the regulations, not having been confirmed as by-laws, as required by statute, were not binding on the Plaintiff firm save so far as they agreed to be bound by the same; and that they were not entitled to have berths appropriated to their ships, or any other special accommodation or conveniences, except upon such terms as might be agreed on between them and the dock company.—Appeal from A. L. Smith, J., dismissed without costs. LONDON ASSOCIATION OF SHIPOWNERS AND BROKERS *v.* LONDON AND INDIA DOCKS JOINT COMMITTEE - - C. A. 242

HUSBAND AND WIFE—Covenant by husband and wife—Liability of wife's executors
See POWER. 2. [510

—— Lunatic wife—Right of husband to be committee - - - - 38
See LUNATIC. 1.

—— Marriage—Domicil—Scotch law - 180
See DOMICIL.

ILLEGITIMATE CHILD—Devise of real estate
See WILL. 1. [88

IMPROVEMENTS — Application of capital — Money—Rent-charges—Redemption 522
See SETTLED LAND ACT. 1.

INDEMNITY—Trustee—Breach of trust - 105
See TRUSTEE. 1.

INFANT—*Contract for Service.*] An infant, in consideration of being employed as a milk carrier, agreed not to compete in business within a radius of five miles for two years after leaving. He left shortly after attaining majority.—An injunction was granted to restrain breach of the agreement by the servant. EVANS *v.* WARE - - 502

INFANT—*continued.*
—— Domicil—Change of father's domicil 180
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—— Signing memorandum of association 555
See COMPANY. 3.

INJUNCTION—Interlocutory—Undertaking as to damages—Measure of damages - 159
See PRACTICE. 3.

INSURANCE, LIFE—Company—Power to purchase its own shares - - 279
See COMPANY. 5.
—— Power of nomination—Exercise by will 63
See POWER. 1.

INTERNATIONAL TRADE MARK CONVENTION - - - - - 472
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INTERROGATORIES - - - 70
See PRACTICE. 1.

INVENTION—Nature of - - - 424
See PATENT.

JOINT TENANT—Tenant in common—Construction of will - - - - 52
See WILL. 4.

LANDLORD AND TENANT—*Agreement for Lease—Public-house—"Usual" covenants—Covenant against assignment without consent—Proviso for re-entry—Date of commencement of Term—Parol Evidence—Option to renew—Specific Performance Vendor and Purchaser Act*, 1874, *s.* 9.] An agreement for the lease of a public-house, dated the 1st of April, provided for a term of three years, with an option to renew for another seven years, and for possession to be given "within one month from this date," but contained no reference as to covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee, (1.) To reside on the premises and personally conduct the business; (2.) Not to assign without consent; and that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses:—*Held*, that covenants 1 and 2 could not be insisted upon as usual covenants; and, on this point, the fact that the subject-matter of the lease was a public-house, made no difference, and that the proviso for re-entry must be limited to the case of non-payment of rent.—*Henderson* v. *Hay* (3 Bro. C. C. 632) followed.—*Held*, also, that the commencement of the term could be collected from the agreement as a whole, and that the day possession was given—a fact on which evidence was admitted—was the date from which the lease was to commence, and consequently that there was a valid contract.—*Marshall* v. *Berridge* (19 Ch. D. 233) discussed and applied.—Where, on a summons under the Vendor and Purchaser Act, 1874, objection is taken that the contract, if valid, is not one of which specific performance can be obtained, the Court will express an opinion upon the construction of the contract, and will decide any question raised at the hearing of the summons which, if left undecided, could be raised again in an action for damages.—Whether there is any difference between a lease for three years, with an option to

LANDLORD AND TENANT—*continued.*
renew for another seven years, and a lease for ten years, with an option to determine at the end of the first three, *query*. *In re* LANDER AND BAGLEY'S CONTRACT. - - - - - 41

LEASE—Building lease—Settled Land Act 382
See SETTLED LAND ACT. 2.
—— Covenants—Usual covenants—Assignment without consent - - - 41
See LANDLORD AND TENANT.

LIEN—Shares—Debt due to company - 506
See COMPANY. 6.

LIFE INSURANCE COMPANY—Power to purchase its own shares - - 279
See COMPANY. 5.

LIGHT—*Injunction—Implied Grant—Right to Extraordinary Amount of Light.*] Where the owner of land grants part of the land with a house upon it, which is to be used for business purposes, the intention to be imputed to the parties in the absence of a special bargain, is that the house is to be granted with light sufficient for all ordinary purposes of business in the locality. In considering the effect of such a grant, the Court must look back to the time when the contract between the parties was entered into, and cannot impute an intention that the premises should be used for a special purpose not shewn to be in the mind of either of the parties at that time.—The owners of a freehold building site in the City of London granted to the Plaintiffs' predecessors in title a lease of a building which had been erected by them in pursuance of a previous building agreement. The building was of considerable size, and contained several sets of rooms intended to be let for commercial purposes. At the date of the building agreement the lessors were the owners in fee of an adjacent house and land, which, subsequently to the lease, they conveyed to the Defendant. The Defendant proposed to erect upon his land a new house thirteen feet higher than the existing house; and, in order to test his right to do so, erected a screen. In an action by the present lessees, under-lessees, and occupiers of the demised building for an injunction, it appeared that the under-lessees of the ground-floor were wool brokers, who used one of their rooms for the purposes of sorting and valuing samples of wool, for which a strong light was required, and that if a house of the proposed elevation were erected by the Defendant two of the windows would be so darkened that these processes could not be carried on, on the ground-floor, so advantageously as formerly, but that the premises would still be in the enjoyment of a good and sufficient light for all the ordinary purposes of business as commonly carried on in the City of London:—*Held*, that the Court could not impute to the parties to the lease an intention that the demised building should be used for wool-broking purposes, or other purposes requiring an extraordinary amount of light; that all that could be reasonably deemed to have been in their contemplation was the grant of sufficient light for ordinary business purposes in the City of London; and that, therefore, the Plaintiffs were not entitled to an injunction. CORBETT *v.* JONAS - 137

LIMITATIONS, STATUTE OF—Administration of estate—Right of residuary legatee to plead statute - - - - 59
See EXECUTOR.

LOCAL AUTHORITY — Breaking up streets — Waterworks company - 117, 289
See WATERWORKS. 1, 2.

LOCAL GOVERNMENT—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13—"*Sewer.*"] M. built ten houses, laid down a large pipe drain at the back of them, and made a drain into it from each house. The large drain ran into a cesspool on M.'s land, near the houses, and was then carried on for a few yards through M.'s land till it reached the foreshore of a tidal river, and then, after passing for a short distance through the foreshore, discharged into the river. No licence to drain through the foreshore had been obtained, and it was not proved that M.'s scheme of drainage had been approved by the local board. After some time the lessee of the foreshore built upon it, and stopped the mouth of the drain, which it was admitted he was entitled to do. The overflow from the cesspool being thus stopped, the cesspool caused a serious nuisance M brought his action against the local board to restrain them from permitting the nuisance to continue, alleging that the structure was a "sewer," and the cesspool a "thing belonging thereto," within the meaning of the Public Health Act, 1875, and was therefore vested in the local board, and that they were bound to keep it in order:—*Held*, by the Court of Appeal (Lord Coleridge, L.C.J., and Lindley, and Lopes, L.J.J.), that this was not a sewer within the meaning of the Act, for that the continuation through the foreshore, which M. had no right to make, must be left out of account, and then there was nothing left but a set of pipes terminating in a pit on M.'s own ground, and, as they did not carry the sewage away, they could not be considered a sewer.—Decision of Chitty, J., affirmed. MEADER *v.* WEST COWES LOCAL BOARD [C. A. 18

LUNATIC—*Married Woman—Right of Husband to be appointed Committee of the Person.*] The husband of a lunatic has no absolute right to be appointed the committee of her person. The Court has jurisdiction to exercise its discretion in making such an appointment as it may think best for the benefit of the lunatic. *In re* DAVY (A LUNATIC) - - - - - C. A. 38

2. —— *Petition for Inquiry—Pending Proceedings—Private Examination of alleged Lunatic under Order of Court by Medical Practitioner—Report to Petitioner's Solicitors—Right of alleged Lunatic to see Report—Proof of Witness to be called—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 94—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 26, *sub-s.* 2.] While evidence was being taken during an inquiry into the state of mind of an alleged lunatic, an order was made under sect. 26, subsect 2, of the Lunacy Act, 1891, at the instance of the Petitioner, that the alleged lunatic should attend to be examined by a medical practitioner, whose evidence was to be used at the hearing. The interview took place in private, and the medical practitioner stated the result of his examination in the form of a letter addressed to the solicitors of the Petitioner:—*Held*, (1.) that under

LUNATIC—*continued.*
sect. 26 of the Act of 1891 there was no obligation on the medical practitioner to make any report whatever; and (2) that the report which he did make was in the nature of the proof of a witness to be called upon behalf of the Petitioner at the hearing, and that the Respondent was not entitled to see or to have a copy of it before the trial of the inquiry.—If the medical practitioner had been so appointed as to occupy the position of an officer of the Court, or in order to report to the Court, then his report ought not to be produced to either party before the trial without the leave of the Court. *In re* B—— (AN ALLEGED LUNATIC) [C A. 194

MAJORITY—Debenture-holders—Power to bind minority - - - - 75
See COMPANY. 1.

MEMORANDUM OF ASSOCIATION—Power to sell assets to new company - 454
See COMPANY. 2.

—— Signed by infant - - - 555
See COMPANY. 3.

MERGER - - - - - 110
See TENANT FOR LIFE.

MISREPRESENTATION—Prospectus of company
See COMPANY. 4. [1

MORTGAGE—*Shares—Creditor's Action to administer Mortgagor's Estate—Receiver—Back Rents and Profits of Security in hands of Receiver—In custodiâ legis—Right of Mortgagee as against Receiver.*] Money in the hands of a receiver is not in custodiâ legis in the same way as if it were in the hands of a sequestrator.—In June, 1886, H. borrowed from R. the sum of £7000 on the security of a transfer of shares in a company. R. took no steps to have himself registered as owner of the shares until 1892. H. died in 1889, having paid interest on the mortgage debt down to April, 1888. In June, 1889, in a creditor's action to administer H.'s estate, a receiver was appointed. In July, 1889, the company issued to the receiver debentures representing arrears of dividends upon the shares accrued prior to H.'s death. In 1892 R. valued his security at £1000, and proved for the balance of his debt. He was afterwards registered by the company as transferee of the shares, and then claimed to have the debentures handed over to him by the receiver:—*Held*, that he was not so entitled, the debentures not being in custodiâ legis for his benefit, but being assets in the hands of the receiver, who for this purpose was in the same position as an executor.—*Delany v. Mansfield* (1 Hog 234) not followed. *In re* HOARE. HOARE *v.* OWEN - - - 94

—— Payment of debt—Right to require transfer of security—Company's lien on shares
See COMPANY. 8. [506

NEGLIGENCE—Transferee of negotiable instrument—Bond payable to bearer - 527
See NEGOTIABLE INSTRUMENT.

NEGOTIABLE INSTRUMENT—*Law Merchant—Railway Bond—Bond payable to Bearer—Collateral Mortgage—Bond fide holder for Value—Loss—Advertisement—Negligence.*] In 1873 an

NEGOTIABLE INSTRUMENT—*continued.*

American railroad company employed B. & Co., a firm of bankers in London, as their agents for the issue of a series of bonds under their corporate seal. By each bond the company acknowledged itself to be indebted to two named trustees or "bearer" in a principal sum which would be due, and the company "would pay to the holder" of the bond, on the 1st of May, 1903, at the office of B. & Co.; and the company "further promised" to pay 6 per cent. interest half-yearly at the said office in accordance with the annexed coupons, which were payable to "bearer." It was further stated on the face of the bond that it and the other bonds of the series were secured by a mortgage of even date made by the company to the trustees upon the company's railroad and property connected therewith. This mortgage contained various provisions for the protection of the bondholders, including a provision that in case of default in payment of interest for ninety days, the principal on all the bonds should forthwith become due and payable.—In 1883 some of the bonds were stolen from B. & Co.'s counting-house, and the firm immediately advertised the loss. In 1891 the agents in Paris of the Plaintiff, a banker in London and Paris, advanced a sum of money to a customer who deposited with them as security some of the stolen bonds, neither the Plaintiff nor his agents being at the time aware that the bonds had been stolen. B. & Co. subsequently gave notice to the Plaintiff that they were stolen, and refused to pay the interest thereon, whereupon the Plaintiff brought an action against them and the railroad company to establish his title to the bonds:—*Held*, that the bonds were negotiable instruments according to the law merchant; and that, notwithstanding the advertisement of the loss, the Plaintiff had not obtained them under such circumstances as to disentitle him to claim as a bonâ fide holder for value.—Mere negligence on the part of the transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor, cannot be pleaded as a defence to an action on the instrument by the transferee. VENABLES *v.* BARING BROTHERS & Co. - - - - 527

NEW TRUSTEES—Appointment of - 132
See TRUSTEE. 2.

NEWSPAPER—Copyright of news - 489
See COPYRIGHT. 3.

OPTION TO RENEW—Lease - - 41
See LANDLORD AND TENANT.

PATENT—*Validity—Disconformity between Provisional Specification and Complete Specification—Nature of Invention—Distinction between Patentable and Non-patentable Inventions—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 5 *sub-s.* 3, 26.] The Plaintiff, an electrician, took out, in 1878, a patent for "Improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or appliances employed therein." He subsequently disclaimed his claims in respect of measuring, conveying, distributing, and regulating by means of the electrometer, and only

PATENT—*continued.*

claimed in respect of an invention for keeping the electro-motive force of the electric current in the mains constant by means of the employment of Planté's secondary batteries, in combination with dynamos, and in conjunction with a regulator.—In an action by the Plaintiff for infringement of his patent, it was *held*, by A. L. Smith, J., that the patent was bad, because (1.) the Plaintiff's complete specification, as amended, did not describe the same invention as his provisional specification, (2.) the invention as described could not be made to work, and (3.) no sufficient information was given by the Plaintiff as to how it was to be made to work; but that if the Plaintiff had not failed in these respects the invention would have been good subject-matter for a patent, and had not been anticipated; and there would have been infringement by the Defendants:—Upon appeal, it was *held* by the Court, in affirming the judgment of A. L. Smith, J., that the Plaintiff's invention was novel; but that his patent, as amended, was invalid upon the grounds (1.) that the original patent was granted for an invention different from that for which he claimed protection after the disclaimers, (2) that it was not, in 1878, useful for the main purpose for which it was designated, viz., the practical lighting of large districts, and (3.) that the specification was insufficient to enable an electrician, of ordinary competence and skill in 1878, to carry it out without further experiments and invention. —*Per* Lindley, L.J.:—An invention is not the same thing as a discovery; and if a man does nothing more than discover that a known machine can produce effects which no one before him knew could be produced by it, his discovery, however great and useful, is not a patentable invention.—To entitle a patentee to maintain his patent, he must make some addition not only to knowledge but to previously known inventions; and must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result.—The discovery that a known thing can be employed for a useful purpose for which it has never before been used is not alone a patentable invention; but the discovery how to use such a thing for such a purpose will be a patentable invention if there is novelty in the mode of using it as distinguished from novelty of purpose; or if any new modification of the thing, or any new appliance, is necessary for using it for its new purpose, and if such mode of user, or modification, or appliance involves any appreciable merit. LANE FOX *v.* KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY C. A. 424

PLEADINGS—Striking out—No defence filed
See PRACTICE. 5. [274

POWER—*General Power of Appointment—E[illegible]cise by Will—Power to be exercised by Will [illegible]ring to Subject-matter—Policy of Life Assur[illegible] Provision for Wife and Children of Assur[illegible] Power of Nomination by Assured—Will no[illegible]ferring to Policy—Wills Act* (1 *Vict. c.* 26), *s.* [illegible]
A policy of insurance was effected with a society the rules of which provided, that the assure[illegible] might nominate any person to receive the sum assured, and that, if no nomination s[illegible]uld be existing when the sum assured shoul[illegible] become

POWER—*continued.*

due, that sum should be paid to the assigns (if any) of the assurer, so far as the claim of such assigns should extend, in every case where such claim should have arisen under any disposition or charge made by the assurer specifically affecting such sum, or any part thereof, either by express reference thereto, or by reference generally to sums due upon assurances, whether such disposition or charge should have been made by deed, will, or other instrument or writing.—In case there should not be any nomination, nor any such disposition or charge existing in respect of the sum assured when due, such sum should be paid to the widow of the assurer, or, if he should not leave a widow, to his children living at his death in equal shares. The assured never made any nomination, disposition, or charge affecting the policy, except so far as the gift of the residue of his estate contained in his will operated as a disposition affecting the policy. By his will he appointed his three daughters to be the trustees and executrices thereof, and he devised and bequeathed the residue of his real and personal estate to his trustees, upon trusts for sale and conversion, and to hold the proceeds upon trust for division into four equal parts, three of which were to be paid to the three daughters respectively, and the fourth was to be invested for the benefit of the widow and children of a deceased son of the testator. The will did not refer either expressly to the policy, or generally to sums due upon assurances. The three daughters survived the testator:—*Held*, that the provisions of the policy were valid; that the power of disposition by will had not been exercised; and that the three daughters were entitled to the policy money in equal shares. *In re* DAVIES. DAVIES *v.* DAVIES - - - - - - 63

2. —— *Testamentary Power—Contract to Exercise—Specific Performance—Damages—Marriage Settlement—Covenant by Husband and Wife that Wife's Power should, if executed, be executed in Favour of Trustees—Breach of Covenant—Liability of Wife's Executors—Appointed Fund Assets for Payment of Wife's Ante-nuptial Debts.*] The Court will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment.—By a marriage settlement, executed in 1867, the husband and wife severally covenanted that all property whatsoever which the wife or the husband in her right should at any time during the coverture become possessed of or entitled to in any manner whatsoever should be settled, and that any power of appointment of which she might then or at any time thereafter during such coverture be the donee, should, if executed by her, be executed only in favour of an 1 trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment over a sum of stock of which, by her will, she exercised in favour of other persons other than the trustees:—*Held*, that the covenant could not be specifically enforced, but that the trustees were entitled to recover by way of damages from the wife's executors to the extent of her assets the value of the property which would have come to the hands of the trustees if the appointment actually made had been in their favour; and that the appointed fund was assets for the payment of her debts.—Whether the husband was liable under his personal covenant, *quære*. *In re* PARKIN. HILL *v.* SCHWARZ 510

POWER OF ATTORNEY—*Agreement for Sale—Sale of Business under Power of Attorney—Partnership—Specific Performance—Waiver by Purchaser.*] A., B., C., and D. traded at E. under the firm of A. & Co. A., who lived abroad, gave a power of attorney to B., by which he authorized him to sell, or concur in selling, any of A.'s property by auction, or privately, upon such terms, subject to such conditions, and in such manner as B. should think fit. B., C., and D. agreed to sell the business as a going concern to H., B. signing as attorney for A. as well as on his own behalf. H. agreed to pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5000 deferred capital; the vendors might require H. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited company, the vendors were to receive shares for their deferred capital; and if the debts were less than £15,000, H. was to pay the difference in cash at the end of two years. It was agreed that H. might carry on the business under the style of A. & Co., and that the vendors should not carry on any like business within fifty miles of E. H. brought an action for specific performance:—*Held*, by Romer, J., that the clause in restraint of trade was not authorized by the power of attorney; that the agreement, therefore, was not binding on A.; that this objection was not removed by H.'s offer to waive that clause; and that the action must be dismissed:—*Held*, on appeal, that the stipulations as to deferred capital did not constitute a partnership, but were only a mode of ascertaining the purchase-money, and that the agreement, therefore, could not be held void as against A. on the ground that the power of attorney did not authorize an agreement for a partnership:—*Held*, further, that, assuming the licence to trade under the name of A. & Co. and the agreement by the vendors not to trade to be unauthorized by the power of attorney, they were stipulations for the benefit of H. which he might waive and, he having waived them, that specific performance ought to be decreed:—*Semble*, that the agreement by the vendors not to trade was authorized by the power of attorney, inasmuch as a going concern could not be sold to advantage without such a stipulation.—Whether the giving an authority to the purchaser to trade in the name of A. & Co. was within the power, *quære*. HAWKSLEY *v.* OUTRAM [C. A. 359

PRACTICE—*Discovery—Affidavit as to Documents—Interrogatories—Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 1, 12.] An action was brought by the attorney-general at the relation of numerous tram-car manufacturers to restrain a tramway company incorporated by Act of Parliament from

PRACTICE—*continued.*

manufacturing and supplying rolling-stock to other companies by means of capital not authorized to be so applied.—The Court refused to order the Defendants to make an affidavit of documents; but allowed the Plaintiffs to interrogate as to what capital the Defendants were employing in such manufacture. ATTORNEY-GENERAL *v.* NORTH METROPOLITAN TRAMWAYS COMPANY - - - - - - 70

2. —— *Discovery—Production of Documents—Motion to remove Trade-mark from Register—Rules of Supreme Court*, 1883, *Order* XXXI., *r.* 12.] In proceedings to remove trade-marks belonging to a firm from the register after all the evidence had been put in with the exception of the cross-examination of two witnesses which was to take place in Court, the Applicant took out a summons asking that the Respondents might be ordered to make an affidavit of documents relating to the matters in question. By the direction of the Court the Applicant stated in writing the grounds upon which he sought to have the marks removed:—*Held*, by Kekewich, J., that an order ought to be made following the usual form as far as possible, but directing (1.) that the Respondents should give the discovery by a named member of their firm who should be the one to be examined in Court; (2.) that the documents to be produced should be those relating to certain specified questions, and (3.) that notwithstanding the generality of the order the Respondents should not be bound to set forth in schedules, or otherwise to mention, all the labels or other documents constituting a class; but it should suffice, as regarded each class of labels or other documents, to mention a specimen or specimens fairly representative of the whole:—*Held*, by the Court of Appeal, that the order was oppressive at that stage of the proceedings; and that the order must be discharged without prejudice to any order which the Judge at the trial might think fit to make as to production of documents.—*Per* Kekewich, J.: In proceedings for the removal of a trade-mark from the register, an order for discovery of documents ought not in general to be made in the common form, but the extent of the discovery to be enforced must depend upon the particular circumstances of each case, and the order ought to be guarded in such manner as to prevent, so far as possible, the inconvenience, with its additional delay and expense, which might result from requiring a trader to set forth all the labels and other documents touching a particular trade-mark from time to time used in his business.—It is convenient in such a case that the Applicant should state in writing to the Court the grounds on which he seeks to have the mark removed from the register. *In re* WILLS' TRADE-MARKS [C. A. 201

3. —— *Interlocutory Injunction—Restraining Sale of Shares—Dismissal of Action at Trial—Measure of Damages.*] The Plaintiff, claiming certain shares as his property, obtained, on giving the usual undertaking as to damages, an interlocutory injunction restraining the shareholder and his mortgagees from parting with the shares.—Before the trial, a summons by the mortgagees, asking that the shares might be sold and the proceeds paid into Court, was successfully opposed by the Plaintiff and the shareholder. At the trial the action was dismissed:—*Held*, that, in ascertaining the amount of damages under the undertaking, all the facts must be considered, including the fluctuations of the market during the continuance of the injunction; and that the amount payable by the Plaintiff was not the difference between the price of the shares when the action was dismissed and the highest price at which they had been quoted during that period, but the difference between the price when the injunction was granted and the price when the summons asking for a sale was issued. MANSELL *v.* BRITISH LINEN COMPANY BANK - - 159

4. —— *Payment into Court—Liberty to Withdraw Admission and Amend Pleading—Terms on which Amendment Allowed—Rules of Supreme Court*, 1883, *Order* XXVIII., *rr.* 1, 6.] The cestui que trust under a settlement sued B. and J., who were in partnership as solicitors, to recover a sum of trust money alleged to have been received by the firm and not duly invested. J. was the sole trustee of the settlement, and was in difficulties. B., by his defence, admitted that J. had paid the money into the banking account of the firm, but without B.'s knowledge; and he made a like admission in his answer to interrogatories. J. made a like admission. Upon these admissions, an order was made in Chambers for B. and J. to pay the money into Court. B. moved to discharge this order so far as it affected him, on the ground that this admission had been made by mistake, and he adduced evidence which shewed conclusively that the money never had come into the banking account of the firm. Stirling, J., held that B. ought to have leave to withdraw his admission as made by mistake, and to amend his defence, and discharged as against B. the order for payment into Court, on the ground that there was no such admission in B.'s affidavits as to justify such an order. The Plaintiff appealed:—*Held*, on appeal, that as the admission was shewn to have been made by mistake, it was right that B. should be allowed to amend his defence for the purpose of withdrawing it; and that on the materials before the Court, apart from that admission, there was no such admission by B. of receipt of the money as would justify an order on him for payment into Court; but that, as on these materials there was still a strong case for contending that the firm had received the money, the order to amend ought not to have been made, except on the terms of the money being brought into Court.—*Freeman* v. *Cox* (8 Ch. D. 148) discussed. HOLLIS *v.* BURTON - - C. A. 226

5. —— *Staying Proceedings—Striking out Pleadings—No Defence filed—Pleading raising important question of Law—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 4.] Applications under Order XXV., rule 4, to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers, except in frivolous cases, and the Court will not entertain such an application if the pleading raises an important point of law.—

PRACTICE—*continued.*
An application to strike out a statement of claim or stay proceedings may be made by the Defendant in a proper case before filing his defence.—*Per* A. L. Smith, L.J.: An application to strike out a pleading can only be made where it can be shewn that the pleading discloses no cause of action or defence on the face of it without extrinsic evidence. ATTORNEY-GENERAL OF THE DUCHY OF LANCASTER *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY - C. A. 274
—— Transfer of winding-up petition - 31
See COMPANY. 15.

PRINCIPAL AND AGENT—Power of attorney—Excess of authority—Sale of business
See POWER OF ATTORNEY. [359

PRODUCTION OF DOCUMENTS - - 70
See PRACTICE. 1.

PROSPECTUS—Misrepresentation in - 1
See COMPANY. 4.

PUBLIC-HOUSE—Lease of—Usual covenants
See LANDLORD AND TENANT. [41

PUBLIC POLICY—Covenant in restraint of trade
See RESTRAINT OF TRADE. [447
—— Fraud of arbitrator—Agreement not to set aside award - - - 441
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RECEIVER—Administration action—Money in hands of receiver—Rights of mortgagee
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RECONSTRUCTION — Company—Sale of assets under articles of association - 454
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RE-ENTRY—Proviso for—Usual covenants 41
See LANDLORD AND TENANT.

REGISTRATION—Company—Certificate of incorporation - - - - 555
See COMPANY. 3.
—— Trade-mark - - - - 549
See TRADE-MARK. 2.

RESTRAINT OF TRADE—*Covenant—Limitation as to Time or Space—Reasonableness—Validity—Public Policy.*] Where a covenant in restraint of trade is general, that is, without qualification, it is bad, as being unreasonable and contrary to public policy; where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable, and, if reasonable, it is good in law.—In considering the question of reasonableness, the points to which the attention of the Court is specially directed are the limits of time and of space, and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade.—The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can be possibly required for the protection of the covenantee, the covenant is unreasonable; but if the restraint is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable; and where the covenant is qualified as to time, the burden lies on the covenantor of shewing that the restraint is unreasonable. BADISCHE ANILIN UND SODA FABRIK *v.* SCHOTT, SEGNER & CO. - 447

2. —— *Covenant—Wholesale and Retail Business—Reasonableness.*] R., a brewer, engaged M. as a traveller for procuring orders for and selling malt liquors, and also, if required by R., aerated waters, to the class known as wholesale purchasing agents in a certain district. M. agreed that for two years after the determination of his employment he would not be concerned in selling malt liquors or aerated waters within a certain district. R. never dealt in aerated waters, nor required M. to obtain orders for them. M., after leaving R.'s employment, became traveller to rival brewers within the prescribed district. R. brought an action, and applied for an injunction. M. insisted that the restriction was too wide, and therefore void. Stirling, J., construed the restriction as only prohibiting M. from selling wholesale, and held that the stipulation as to aerated waters was severable, and granted an injunction limited to selling malt liquors wholesale:—*Held*, on appeal, that the agreement must be construed as prohibiting M. from selling wholesale or retail within the limit, and that the restraint was not greater than was necessary for the reasonable protection of R., for that selling wholesale and retail were not two distinct businesses, but only different modes of carrying on the one business of selling malt liquors, that the selling malt liquors either wholesale or retail within the district might affect R.'s business, and that R. was entitled to restrain M. from selling malt liquors in any way within the district:—*Held* also, affirming the decision of Stirling, J., that the stipulation as to aerated waters was severable. ROGERS *v.* MADDOCKS - C. A. 346

RULES FOR WINDING-UP, 1890, r. 71 307, 332
See COMPANY. 13, 14.

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—— **Order LV., rr. 3, 4** - - - 59
See EXECUTOR.

SALE—Business—Power of attorney—Unauthorized terms - - - 359
See POWER OF ATTORNEY.

SCOTCH LAW—Husband and wife—Domicil of origin—Ante-nuptial contract - 180
See DOMICIL.

SERVICE—Contract for—Infant - - 502
See INFANT.

SETTLED LAND ACTS—*Application of Capital Money—Improvement Rent-charges—Payment or Redemption—Repayment to Tenant for life of past Instalments of Rent-charges paid by him—Settled Land Acts*, 1882, *s.* 21 (*ii.*) (*iii.*)—1887, *ss.* 1, 2, *and* 3—1890, *s.* 15.] Where improvements authorized by the Settled Land Acts have been effected upon settled land, and paid for with money borrowed, and repayable by a rent-charge, under the Improvement of Land Act, 1864, the Court cannot, under sect. 15 of the Settled Land Act, 1890, direct the trustees to apply capital moneys in their hands in repaying to the tenant for life any instalments of such rent-charge paid by him before the date at which he has required provision to be made for payment or redemption under the Settled Land Act, 1887. *In re* DALISON'S SETTLED ESTATE - - - 522

2. —— *Tenant by the Curtesy—Tenant for Life—Building Lease—Deed operating as Exercise of Statutory Power—Trustees of Settlement—Absence of Notice—Dealing in Good Faith—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 20, 45, 53, 58, *sub-s.* 1 (*viii.*)—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 8.] In October, 1884, one H., purporting to demise as absolute owner (which he believed himself to be), granted a building lease of certain land to the Plaintiff for the term of ninety-nine years.—The Plaintiff made no inquiry as to H.'s title, but assumed that he was the absolute owner of the land demised.—The Defendant afterwards agreed to purchase the lease of the demised land from the Plaintiff; but, on investigating the title, he discovered that the land had, under a will, belonged to H.'s deceased wife, and that H. was only tenant by the curtesy.—A tenant by the curtesy has, under sect. 58, sub-sect. 1 (viii.), of the Settled Land Act, 1882, all the powers of a tenant for life; but the lease, though complying with the enabling sections of the Settled Land Acts, contained no reference thereto; and at its date there were no trustees of the will, to whom the notices, required by sect. 45 of the Settled Land Act, 1882, in the case of a lease by a tenant for life, could be given.—The Defendant then refused to complete, upon the ground that the lease was invalid, or, if not, that the Plaintiff's title was so questionable that it ought not to be forced upon a purchaser.—In an action by the Plaintiff for specific performance of the agreement:—*Held*, by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.), affirming the judgment of Kekewich, J., (1.) that the lease could, and did, operate under the Settled Land Act, 1882, to convey the land within the meaning of sect. 20, sub-sect. 2; and (2.) that, as to the absence of trustees of the settlement and the want of the notices required by sect. 45, the Plaintiff, having dealt with the lessor in good faith, was protected by sect. 45, sub-sect. 3. And *held*, accordingly, that the lease was a valid lease, although there were no trustees, and that the Plaintiff was entitled to specific performance of the agreement.—The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing bonâ fide with tenants for life when exercising their powers under the Settled Land Acts. MOORIDGE *v.* CLAPP [C. A. 382

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See LOCAL GOVERNMENT.

SHARES—Purchase of, by company—Extinguishment of shares - 279

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See PRACTICE. 3.

SOLICITOR—*Costs—Lien—Assignee—Charging Order—Practice—Attorneys and Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.] Under sect. 28 of the Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127), the assignee of a solicitor employed by the Plaintiff in an action may apply for and obtain a charging order on the property recovered in the action for the costs incurred to such solicitor and assigned by him to the applicant.—*Baile* v. *Baile* (Law Rep. 13 Eq. 497) reluctantly followed. *Savage* v. *James* (I. R. 9 Eq. 357) explained. BRISCOE *v.* BRISCOE - - - - 543

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15 & 16 Vict. c. 55—*Trustee Act* - 132

See TRUSTEE. 2.

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See PATENT.
—— —— ss. 64, 103 - - - 472
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47 & 48 Vict. c. 18, s. 8—*Settled Land* - 382
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49 & 50 Vict. c. 33, s. 6—*International Copyright* - - - - 402
See COPYRIGHT. 2.
50 & 51 Vict. c. 30, ss. 1, 2—*Settled Land*
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51 & 52 Vict. c. 59, s. 6—*Trustees* - 105
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SURPLUS ASSETS—Company—Distribution of
See COMPANY. 16. [165

TENANT FOR LIFE—*Merger—Intention—Life Estate and Estate pur autre vie—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 4—"*Merger by Operation of Law only*"—*Surrender.*] Lands (subject in part to legal mortgages in fee) were devised to the use of two successive tenants for life. The first tenant for life being a lady of advanced age, and desirous of relinquishing the management of the lands, by deed conveyed them to the second tenant for life to hold to him, his heirs and assigns, during all the remainder of her life, to the use that she might thenceforth during the remainder of her life receive an annual sum of £400 to be issuing out of the rents and profits, and subject thereto to the use of the second tenant for life, his heirs and assigns, during the remainder of her life. The deed contained a proviso reducing the amount of the rent-charge so long as she continued to reside with him and he provided her with certain conveniences. He having died in her lifetime:—*Held,* that sect. 25, sub-sect. 4, of the Judicature Act, 1873, applied to the case; and that, having regard to the intention of the parties manifest on the face of the deed, there was no merger of the estate of the first tenant for life in that of the second tenant for life. SNOW *v.* BOYCOTT - - - 110

—— Settled Land Act—Building lease - 382
See SETTLED LAND ACT. 2.

TENANT IN COMMON—Joint tenant—Construction of will - - - - 52
See WILL. 4.

TRADE-MARK—*Foreign Trade-mark—International Convention—Patents, Designs, and Trade Marks Acts,* 1883 *to* 1888, *ss.* 64, 103.] Sect. 103 of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, does not authorize the registration of a trade-mark outside the definition of a trade-mark given by sect. 64. *In re* CARTER MEDICINE COMPANY'S TRADE-MARK - - - - 472

2. —— *Old Mark—Alteration—Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 92—*Name or Initials of Proprietor—Discretion of Court—Essential and Non-essential Particulars.*] A trade-mark registered as an old mark ought to be registered and kept registered just as it was used, and, in the absence of special circumstances rendering alteration necessary, no alteration of such mark ought to be allowed.—The circumstance that the proprietor of an old mark, whose name or initials form part of such mark, has transferred to another person the business in connection with which the mark has been used, is not sufficient to induce the Court to allow an alteration of the mark by substituting the name or initials of the new proprietor for the name or initials of the former proprietor. *In re* HENRY CLAY AND BOCK AND COMPANY - 549

—— Removal from register—Discovery - 201
See PRACTICE. 2.

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See COMPANY. 15.

TRANSLATION—Foreign play - - 402
See COPYRIGHT. 2.

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See TRUSTEE. 1.

TRUSTEE—*Breach of Trust—Indemnity—Trustee Act,* 1888 (51 & 52 *Vict. c.* 59), *s.* 6—*Breach of Trust committed "at the instigation or request or with the consent in writing of a Beneficiary"—Request without Writing.*] In sect. 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), providing for indemnity to a trustee who has committed a breach of trust "at the instigation or request or

TRUSTEE—*continued.*

with the consent in writing of a beneficiary," the words "in writing" apply only to "consent," and not to "instigation" or "request."—The discretion which the section confers upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust.—Where a trustee for a married woman, tenant for life restrained from anticipation, advanced part of the capital to her upon her verbal request and statement that the money was needed to prevent her home from being sold up:—*Held*, that the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the income payable to the married woman.—*Ricketts* v. *Ricketts* (64 L. T. (N.S.) 263) distinguished. GRIFFITH *v.* HUGHES - - **105**

2. —— *New Trustees—Appointment by Court—Existing Trustee—Statutory Power—Beneficiaries, wishes of—Practice—Jurisdiction—Trustee Acts*, 1850 *and* 1852 (13 & 14 *Vict. c.* 60; 15 & 16 *Vict. c.* 55)—*Conveyancing and Law of Property Act*, 1881 *s.* 31.] The Court has no jurisdiction, under the Trustee Acts, to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory power of appointing new trustees under sect. 31 of the Conveyancing and Law of Property Act, 1881, even though the application to the Court is made by a majority of the beneficiaries, and the existing trustee has himself no beneficial interest. *In re* HIGGINBOTTOM - - - - **132**

3. —— *Vesting Order—Stock standing in Sole Name of Deceased Person—Personal Representative out of Jurisdiction—Trustee Act*, 1850, *ss.* 24, 25.] Under sect. 25 of the Trustee Act, 1850, the Court has power to make a vesting order in relation to stock standing in the sole name of a domiciled Scotchman whose executor has proved his will in Scotland, but has not proved it in England, and who is resident in Scotland. *In re* TRUBEE'S TRUSTS - - - - **55**

ULTRA VIRES ACT—Dock company—Public Injury—Special damage to Plaintiff **242**
See HARBOURS AND DOCKS.

UNDERTAKING—For damages—Interim injunction—Corporation - - **289**
See WATERWORKS. 2.

VENDOR AND PURCHASER—*Restrictive Covenant—Property sold in Plots—Covenant against Building without consent of Vendor, "his Heirs or Assigns"—Meaning of "Assigns."*] About 1874, D., the owner of the B. estate, began to offer it in plots, on conveyances and leases, as building sites. Intending purchasers and lessees were shewn, by D.'s agent, a form of agreement, a clause of which provided that the conveyance should contain certain restrictive covenants (to run with the land conveyed), including a covenant that the purchaser would not "without the consent in writing of D., his heirs or assigns," erect any building on the land conveyed, other than that

VENDOR AND PURCHASER—*continued.*

which was to be built, according to the agreement, before the conveyance was executed.—In 1874, X. signed an agreement for leases from D., of two of the plots, Glendorgal and St. Aloysius, on each of which a house was to be built. The agreement gave X. the option to purchase the fee simple, and provided that the leases, and the subsequent conveyances, if any, should contain restrictive covenants, including the above covenant against further building without the consent aforesaid.—The lease of Glendorgal was granted to X., in April, 1876, and was assigned by him to L.—In July, 1879, the fee simple was conveyed to L., the conveyance containing (inter alia) a covenant against building without the consent aforesaid.—In June, 1883, L. conveyed Glendorgal to the Plaintiff, subject to the restrictive covenants.—The lease of St. Aloysius was granted to X., in July, 1876, and in September, 1876, the fee simple was conveyed, with his concurrence, to the Defendant, the conveyance containing a covenant against building without consent, similar to that in the conveyance of Glendorgal.—In 1890, D. having died, the Defendant, with the consent in writing of his successors in title (the owners of such part of the B. estate as had not been conveyed in plots), erected further buildings on his land.—Some hundreds of houses had then been erected on the B. estate, but a large portion of it still remained, unbuilt on, in the hands of D.'s successors in title:—*Held*, that, assuming the Plaintiff was entitled to enforce the restrictive covenant, in the Defendant's conveyance, against building, there had been no breach of such covenant; because the consent, required and obtained, was that of the owner of the B. estate in its popular and broad sense, and not of such owner and of all lessees and purchasers acquiring title after the date of the conveyance to the Defendant.—*Semble*, that the Plaintiff was not entitled to enforce the covenant. EVERETT *v.* REMINGTON - - - - - **148**

VESTING ORDER - - - - **55**
See TRUSTEE. 3.

VOLUNTARY WINDING-UP - **165, 563**
See COMPANY. 12, 16.

WATERWORKS—*Local Authority—Landowner—Private Road—"Street"—Entry and digging up without Consent of Owner—Injunction—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29—*Public Health Act*, 1875, (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 54, 57.] Although a private road is a "street" within sect. 4 of the Public Health Act, 1875, the wide powers given to a local authority by sects. 16 and 54 to carry water-mains through any "street" in their district for the supply of water within the district, are controlled by sect. 57, incorporating sect. 29 of the Waterworks Clauses Act, 1847, which prohibits any private land being entered upon and broken up for the purpose of laying mains without the consent of the owner; and the Court will therefore grant an injunction at the instance of the owner of any private road entered upon by the local authority for the purpose without his consent. HILL *v.* WALLASEY LOCAL BOARD **117**

WATERWORKS—*continued.*

2. —— *Water Company—Local Authority—Breaking up Streets—Laying Water-pipes—Notice—Plan—"Difference to be determined by two Justices"—Special Act—"Extension" of Works—Laying down Pipes after expiration of Period for completion of Works—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 30, 31—Practice—Interim Injunction—Undertaking in Damages—Corporation.*] The "plan" required by sect. 31 of the Waterworks Clauses Act, 1847, to be furnished by a water company to the road authority before breaking up a road for the purpose of laying down a line of pipes, is a plan, not merely of the "breaking up" of the road, but also shewing the mode in which the underground work is intended to be executed, so as to enable the road authority to judge whether the proposed work ought to be done without modification. If the road authority, after receiving such a plan, do not, in case of disapproval, themselves make some counter-proposal, by plan or otherwise, as to the mode of carrying out the work, so as to create a "difference" to be determined by two Justices under the section, the company may proceed with the work independently of the road authority.—*Edgware Highway Board v. Colne Valley Water Company* (46 L. J. (Ch.) 889) approved of.—Order of Kekewich, J., varied.—*Semble*, where under a special Waterworks Act, incorporating the Waterworks Clauses Act, 1847, a water company has, within the period fixed by the special Act for the completion of the works, laid down a water-main in a road within the limits of the Act according to deposited plans and sections, the company may, after the expiration of the period, lay down a second main, having regard to sect. 28 of the general Act, and particularly where the special Act gives them power to "extend, enlarge, or alter any of their mains or pipes at any time, and from time to time as occasion may require, for the purpose of supplying the inhabitants within the limits of the Act with water"; provided the company complies with the requirements of the special and general Act, as to notice and otherwise, before breaking up the road for the purpose.—*Per* Kekewich, J.: Where an interim injunction is granted at the instance of a plaintiff corporation, the Court will, in a proper case, allow the usual undertaking in damages to be given by the corporation itself, and not require the undertaking to be given by some responsible individual on behalf of the corporation; and the same practice may apply where the plaintiff is a local board. EAST MOLESEY LOCAL BOARD *v.* LAMBETH WATERWORKS COMPANY - - - C. A. 289

WILL—*Construction—Children—Legitimacy—Child born out of Wedlock—Legitimation by subsequent Marriage of Parents—Devise—Specific Devise of Life Estate.*] The rule laid down in *Doe v. Lord* (2 Cl. & F. 610; 7 Cl. & F. 835), that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England, relates only to the case of a person of uncertain ancestry, and does not affect the rule in a case where the relationship of "children" is clearly established. A testator specifically devised a freehold estate to his son for life, and after his death among all his children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void and cease as if he were dead, and the estate devised to him should "thenceforth absolutely vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession; the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age and one under age, and he afterwards had other children:—*Held*, by Kekewich, J., that the appointment of a receiver was a taking in execution within the meaning of the clause, and that the son's life estate determined. This decision was not appealed from:—*Held*, by the Court of Appeal (affirming the decision of Kekewich, J.), that as the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate, they were not contingent remainders but executory devises, and took effect in favour of all such children of the son whenever born as attained twenty-one. BLACKMAN *v.* FYSH - - - - - C. A. 209

WILL—*continued.*

the death of his son, for all his son's "children" in equal shares:—*Held*, that a child of the son, born out of wedlock, but legitimated according to the law of the son's domicil, by the subsequent marriage of its parents, was entitled to share with a child born after the marriage in both the realty and personalty. *In re* GREY'S TRUSTS. GREY *v.* STAMFORD - - - - 88

2. —— *Construction—Contingent Remainder or Executory Devise—Forfeiture Clause—Cessor of Life Estate on "being taken in execution by any process of law"—Appointment of Receiver for Judgment Creditor.*] A testator devised a freehold estate to his son for life, and after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void and cease as if he were dead, and the estate devised to him should "thenceforth absolutely vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession; the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age and one under age, and he afterwards had other children:—*Held*, by Kekewich, J., that the appointment of a receiver was a taking in execution within the meaning of the clause, and that the son's life estate determined. This decision was not appealed from:—*Held*, by the Court of Appeal (affirming the decision of Kekewich, J.), that as the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate, they were not contingent remainders but executory devises, and took effect in favour of all such children of the son whenever born as attained twenty-one. BLACKMAN *v.* FYSH - - - - - C. A. 209

3. —— *Construction—Forfeiture Clause—Validity—Repugnancy—Forfeiture on Assigning or attempting to Assign—Assignment inoperative independently of Forfeiture Clause.*] A testator by his will gave the residue of his estate to trustees, on trust to pay an annuity of £50 to his widow in case she should marry again (which she did) during her life, and subject thereto to pay the income to his two sisters, in equal shares, during their lives, and on the death of the survivor during the remainder of her life, or after her death to divide the capital equally between the testator's nephews and nieces, to be paid to them at twenty-one, the share of any of them dying under that age having been to go to such sister and the share of any of them dying under that age without leaving issue living at twenty-one, such share should fall into the residue, to go to the testator's nieces and nephews and nieces, and to the issue of any of them.

WILL—*continued.*

of them as should be then dead, such issue to represent their respective parents, and to take equally amongst them, if more than one, and, if but one, such one only, the same share as his, her, or their deceased parent would have taken if he or she had then been living and had been a surviving nephew or niece. And the testator declared that if any of his nephews or nieces should, during the lives of his two sisters or the survivor of them, assign his or her expectant share, or any portion thereof, or should attempt so to do, then he or she so assigning his or her expectant share, or any portion thereof, or attempting so to do, should forfeit all benefit under the testator's will; and the assignment, so far as it should purport to affect any part of the trust moneys, should be null and void, and the share of the person so assigning, or attempting so to do, should go, as if he or she had never been born, to the other nephews or nieces. The survivor of the testator's two sisters died in 1890. In 1876 one of the testator's nieces, who had attained twenty-one, married in Australia a domiciled Australian. No settlement was made on her marriage; but in 1879 she and her husband executed a post-nuptial settlement, which purported to assign (inter alia) her reversionary interest under the will of the testator to trustees upon certain trusts. By the law of Australia this assignment was inoperative except to the extent of the husband's interest (if any) in the wife's reversionary share:—*Held*, (1.) that the forfeiture clause was valid notwithstanding that the reversionary interests were originally vested but liable to be divested; (2.) that, although the settlement was inoperative as regarded the wife, it was, within the meaning of the clause, an attempt to assign her reversionary share, and that the forfeiture had taken effect. *In re* PORTER. COULSON *v.* CAPPER - 481

WILL—*continued.*

4. —— *Construction—Joint Tenancy or Tenancy in Common—Gift of Real and Personal Estate in trust for A., B., and C., and for their respective Heirs, Executors, Administrators, and Assigns—Lapse.*] A testator gave the residue of his real and personal estate to trustees, in trust for his nephews, J., T., and G., and for their respective heirs, executors, administrators, and assigns. J. died before the testator. G. died after the testator, an infant and unmarried:—*Held*, on the authority of *Ex parte Tanner* (20 Beav. 374) and *Doe* v. *Green* (4 M. & W. 229), that the nephews were joint tenants for their lives and the lives of the survivors and survivor, with several remainders to them as tenants in common, and that T. was entitled to the income of the whole for his life:—*Held* also, that the share in remainder of J. lapsed, by reason of his death before the testator, and devolved as on an intestacy.—*Gordon* v. *Atkinson* (1 De G. & Sm. 478) distinguished. *In re* ATKINSON. WILSON *v.* ATKINSON - 52

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